115-353

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~202~~. 33

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY, APPELLANTS,

vs.

EDMUND H. WATTS.

FILED OCTOBER 3, 1882.

No. ~~150~~. 176

EDMUND H. WATTS, APPELLANT,

vs.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY.

FILED NOVEMBER 24, 1882.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 292.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY, APPELLANTS,

vs.

EDMUND H. WATTS.

FILED OCTOBER 3, 1882.

No. 450.

EDMUND H. WATTS, APPELLANT,

vs.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY.

FILED NOVEMBER 24, 1882.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 9096.

Extracts from transcript from U.S. district court. Filed May 7th, 1880.

Libel. Filed Oct'r 10th, 1879.

DISTRICT OF LOUISIANA, *ss:*

United States District Court, District of Louisiana.

District Court of the United States in and for the District of Louisiana. In Admirality.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 11452.

To the honorable Edward C. Billings, judge of the district court of the United States for the district of Louisiana:

2 The libel and complaint of Edmund H. Watts, of London, Kingdom of Great Britain, who brings this his libel against John B. Camors and J. H. Jackson, copartners, doing a business in the city of New Orleans, in said district, under the firm name and style of J. B. Camors & Co., and who reside and are present in the said district of Louisiana, in a cause of contract, civil and maritime, and therefore the said libellant articulately alleges and propounds as follows:

1st. That the said libellant, at and prior to the 7th day of August, 1879, was and still is the owner and entitled to the possession of the British steamship called the "Highbury." That said vessel was and is of the tonnage of 1,100 tons burthen, and in all things staunch, seaworthy, well and completely manned and equipped for a voyage at sea, laden with cargo, and had full and sufficient capacity to carry 11,500 quarters of wheat from the port of New Orleans to Havre, in France, or to any other port on the Atlantic or Mediter-
3 ranean Oceans or any port named in the contract of charter-party hereinafter referred to.

2nd. That the commercial firm of A. B. French & Co., doing business in the city of New Orleans, aforesaid, were, before and on the 7th day of August, A. D. 1879, the duly authorized agents of the owner of said steamship "Highbury," and had full and complete authority from the owners thereof to enter into and bind said steamship and the masters and owners thereof in any contract for freight for said steamship, or any contract of charter-party relating thereto.

3rd. That on the said 7th day of August, A. D. 1879, the said

libellant, through said agents, A. B. French & Co., acting in that behalf for said libellant, and with his consent and approval, did enter into and make with the said respondents, J. B. Camors & Co., a contract of charter-party relating to said steamship "Highbury," at the said city of New Orleans, whereby the said respondents did, by and in a contract in writing, charter and engage said
4 steamship "Highbury" for a voyage from the port of New Orleans to the port of Havre, St. Nazaire, Antwerp, Bordeaux, or Bremen, as the said respondents should order or elect at the time of the signing of the bills of lading, for which the said respondents were by said contract to *laid* upon said vessel.

4th. That said written contract of charter-party was and is in the words and figures and substance as hereinafter set forth, that is to say:

"This charter-party, made and concluded upon in the city of New Orleans, La., the 7th day of August, 1879, between A. B. French & Co., agents for the owners of S. S. "Highbury," of the burthen of 1,100 tons, or thereabouts, registered measurement, now due here between 10 & 20 of Sept'r, of the first part, and J. B. Camors & Co., of the second part, witnesseth: That the said party of the first part agrees in the freightening and chartering of the whole of the said vessel (with the exception of the cabin and necessary room for the crew
5 and storage of provisions, sails, and cables) unto said party of the second part for a voyage from New Orleans to Havre, St. Nazaire, Antwerp, Bordeaux, or Bremen, orders, on signing bills of lading, on the terms following: The said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board during the aforesaid voyage the merchandise hereinafter mentioned.

"The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo, say, about 11,500 quarters of wheat in bulk, and pay to the said party of the first part, or agent, for the use of the said vessel during the voyage aforesaid seven shillings and six pence per quarter of 480 lbs. weight delivered in full, payable in cash on right delivery of the cargo.

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the vessel is ready to receive or discharge cargo:

6 "Fifteen running days (Sundays excepted) for loading and discharging, lay days to commence when the captain reports the vessel is ready for cargo; and that for each and every day's detention by default of said party of the second part, or agent, fifty pounds ster'g per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent.

"The cargo or cargoes to be received and delivered within the fifteen days above specified, the dangers of the sea and navigation of every nature and kind always mutually excepted.

"To the true and faithful performance of all and every of the foregoing agreements we, the said parties, do hereby bind ourselves,

our heirs, executors, administrators, and assigns, and also the said vessel's freight, tackle, and appurtenances and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of freight.

"In witness whereof, we have hereunto set our hands, the day and year first above written.

7 (Signed) "J. B. CAMORS & CO.
" "A. B. FRENCH & CO.,
"*Agent- for the Owners.*

"Signed in presence of—
(Signed) "ED. GUMP."

5th. That said contract of charter-party was executed as above set forth, and at the date therein set forth, and was and is in all things binding upon the parties thereto. That the said steamship arrived in New Orleans before the 20th day of September, A. D. 1879. That on the 11th day of September, A. D. 1879, the said vessel was in said port of New Frleans, in all things ready to receive cargo. That on the day last mentioned the said respondents were notified by the master of said steamship that the said steamship was ready to receive and load on board a cargo of wheat in bulk, according to the terms of said charter-party, said vessel having full capacity to receive and take on board the full amount of 11,500 quarters of wheat of the weight of 450 lbs. per quarter, and was in all things ready and willing so to do, and to
8 comply with all and singular the stipulations and *and* obligations contained in said charter-party, binding upon said steamship and its owner.

6. That the said respondents in all things made default, and refused and neglected to comply with the terms and conditions of said charter party, binding upon them, and although often requested so to do, did so refuse and neglect to lade any wheat or cargo upon said vessel during the entire fifteen days named as the day for lading in said charter-party; and further, that after the expiration of the fifteen lay days (Sundays excepted) had elapsed, the said master of said steamship, Jacob Garson, did in due form demand of and from the said respondents the penalty of fifty pounds per diem, as stipulated in said charter party, for each day in excess of said stipulated lay days. And the said respondents, unmindful of their obligations in the premises, wholly refused to pay the same or to lade said vessel, as stipulated in said charter-party, or to in any way indemnify*ing* the libellant, making frivolous excuses for their bad faith and
9 conduct in the premises. Wherefore the said master of said steamship did, in due form, on the 30th day of September, A. D. 1879, protest against the said respondents and their said acts before Edward Ivy, a notary public in said city of New Orleans, as will more fully and at large appear by an attested copy thereof hereto annexed and made a part hereof, marked "A," of all of which the said respondents had full notice.

7th. That the said steamship was compelled to remain in port awaiting the fulfilment of said charter-party contracted by said de-

fendants for the full period of two days beyond the lay days provided in the said charter-party, for which the said respondents are indebted to libellant for the sum of fifty pounds for each and every day thereof.

8th. That by reason of the said acts and doings of the said respondents, and by the terms of said contract charter-party, the said respondents became and are indebted to said libellant in the full sum of the estimated freight on said cargo, worth ——, which, under the terms of said charter-party, said steamship was to have
10 been laden, to wit, the sum of seven shillings and six pence for each and every quarter of 11,500 quarters of wheat of the weight of 480 lbs. each, amounting in the total to the full sum of £4,012 10*s.*, amounting in the currency of the United States to $20,700; for which sum the said respondents are justly and truly indebted to libellant by reason of the stipulations of said charter party and the said breach of the conditions thereof by said respondents, who have not paid the same or any part thereof.

That all and singular the premises are true and within the admiralty cognizance of this hon. court.

Wherefore the libellant prays process *in personam* in due form, according to the practice of this court in admiralty causes, against the said John B. Camors, the said J. H. Jackson, individually and as members of the said copartnership and firm of J. B. Camors and Company, commanding them, and each of them, to be and appear in this hon. court on a day certain, to be named in said process, and then and there due answer make to the premises; and that
11 after due proceedings had, according to the course of practice in this hon. court in like causes, that your honor pronounce against the said respondents, and condemn them, and each of them, individually and as copartners, to pay to libellant the full sum by said libellant herein demanded of them, besides all costs and expenses incurred by said libellant in enforcing his said rights in the premises. And he will ever pray, &c.

(Signed) J. R. BECKWITH,
Proctor for Libellant.

Schedule.

J. B. Camors & Co. to S. S. "Highbury" & owners, Dr.

To freight on 11,500 quarters of wheat, at £0 7*s.* 6*d.*, £4,312 10; (U. S. cur. $4.80)	$20,700 00
To demurrage, 2 days, £50	480 00
	$21,180 00

EXHIBIT A ANNEXED TO LIBEL.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

12 Know all men by the public instrument of protest, that whereas I, Jacob Garson, master of the British steamship "Highbury," in compliance with the terms and stipulations of a

charter-party, made at New Orleans, Louisiana, on the 7th day of August, 1879, by A. B. French & Co., the agents for the owners of said vessel, and J. B. Camors & Co., merchants of New Orleans, Louisiana, did, on the 11th day of September, 1879, give notice to the charterers that I was ready to receive and load on board my said vessel a cargo of wheat in bulk, according to thd terms and stipulations of the charter-party;

And whereas the said charterers have not furnished any cargo for my said vessel, although repeatedly requested to do so, and the fifteen running days (Sundays excepted) having expired, I did present them with a bill for detention, as per charter-party, which they refused to pay;

And whereas I have well and truly complied with and performed all and singular the terms and conditions of said charter-party, I have protested, and by this public instrument do protest,
13 against the said charterers, their agents, and assigns, and declare it to be my purpose and intention to hold them, all and singular, liable and responsible for all loss in freight, costs, charges, and expenses which have already accrued or which may hereafter accrue by, through, or in consequence of the default and failure of the said charterers or their agents or assigns in the premises. And that I also claim and demand the penalty for non-performance of agreement, as stipulated in charter-party, to wit, estimated amount of freight, ——.

In testimony whereof I have hereto set my hand and seal at New Orleans, this thirtieth day of September, A. D. 1879.

(Signed) JACOB GARSON, *Master.*

Witnesses:
(Signed) THAD. J. CLARK.
" FRANK A. DANIELS.

UNITED STATES OF AMERICA,
State of Louisiana, City of New Orleans:

Thus done and protested before me in the presence of the above signed competent witnesses.

14 In testimony whereof, I have hereto set my hand and seal of office, this 30th day of September, A. D. 1879.

[SEAL.] (Signed) EDWARD IVY,
Notary Pub.

I hereby certify that I did this day serve a true copy of the foregoing act of protest on J. B. Camors & Co., at their office in this city, by delivering the same into the hands of J. B. Camors of said firm.

In testimony whereof, I have hereto set my hand and seal of office, this first day of October, A. D. 1879.

[SEAL.] (Signed) EDWARD IVY,
Not. Pub.

I hereby certify that the above and foregoing are true copies of

the original protest and certificate of service extant in my current register.

In testimony whereof, I have hereto set my hand and seal of office, this first day of October, A. D. 1879.

[SEAL.] (Signed) EDWARD IVY,
Not. Pub.

15 EXHIBIT "A."—Referred to in Deposition of Jacob Garson.

NEW ORLEANS, *Sept. 12th*, 1879.

JACOB GARSON, *Master S. S. Highbury.*

DEAR SIR: We have received your notification stating that the S. S. Highbury under your command is ready for cargo, and have transmitted said notification to Mess. Gordon & Gomilla, to whom we had sold the charter of said vessel.

These gentlemen return for answer that they decline to accept said vessel upon said charter, on the ground that the actual tonnage is greater than expressed in the charter. They further call upon us to deliver a steamer of the size mentioned, and we also call upon you to do the same.

Yours, truly,
(Signed) J. B. CAMORS & CO.

16 *Answer. Filed October 20th*, 1879.

U. S. District Court. In Admirality.

EDWARD H. WATTS
vs.
J. B. CAMORS & Co., & JOHN B. CAMORS & J. H. JACKSON. } No. 11452.

Now comes J. B. Camors & Company, a commercial firm domiciliated in the city of New Orleans, and John B. Camors and J. H. Jackson, the members of said firm, defendants herein and for answer to the libel of Edward H. Watts, libellant, do allege and propound as follows, to wit:

1st. The defendants admit the ownership of the steamer Highbury, and that the said steamer was staunch, seaworthy, and well manned and equipped as stated in the first article of the libel; these aver the fact to be that the said steamer was and is of the tonnage of twelve hundred and three (1203) tons and not eleven hundred (1100) tons as alleged in said libel; and these defendants further aver that the said steamer was and is of the carrying capacity
17 much greater than a vessel of eleven hundred (1,100) tons, and save and except as aforesaid these defendants have no knowledge or information or belief as to the carrying capacity of said steamer.

2d. These defendants admit the agency of A. B. French and Company as stated in the second article of said libel.

3d. These defendants admit the execution of the charter-party, as

alleged in the third article of said libel, and that the fourth article of said libel correctly set forth said charter-party.

4th. These defendants for answer to the fifth article of said libel admit that said steamer arrived in New Orleans and was there in readiness to receive cargo on September 11th, 1879; these defendants further admit the notification given to these defendants as stated in the fifth article of said libel, but these defendants deny that said charter-party became binding upon these defendants by reason of facts hereinafter alleged.

5th. These defendants for answer to the sixth article of the said libel aver that they had good and sufficient cause not to ship
18 any cargo in said steamer, for and because said steamer did not conform to the charter-party as is hereinafter more fully set forth, and, having such cause, these defendants admit the demand upon them, and their refusal to comply therewith, and the protest alleged in said article, and that they did not lade any cargo on said steamer; and these defendants deny that they made any frivolous excuses in respect to said charter-party and its fulfilment, or that said charter-party ever became binding upon them.

6th. These defendants, for answer to the seventh article of said libel, deny the matter and things to be true as alleged in said article of said libel, but in respect to said matters the facts are as follows, that is to say, that on the arrival of the said steamer in New Orleans, on September 11th, 1879, these defendants discovered the fact to be that the tonnage of said steamer and her carrying capacity was much greater than a vessel of eleven hundred tons, or thereabouts, required and stipulated to be furnished in said charter party; and there-
19 upon these defendants notified the libellant that the tonnage stated in the charter party was material, and that the variance between the actual tonnage and that represented in the charter party rendered the vessel wholly unsuited for the purpose and object of the charter party, as is more fully set forth hereinafter, and that that vessel would not be accepted in fulfilment of the said charter party; and these defendants admit that after said notification the said steamer remained in port for the time stated in the said seventh article of the said libel, and for a larger time than as stated therein; but these defendants aver that the time said steamer so remained in port beyond said lay days was occupied in taking on another cargo, procured from other parties after the expiration of said lay days, and said cargo was commenced to be laden on board before the expiration of three days beyond the said lay days, that is on the 2nd October, 1879; and these defendants deny that from any fault of these defendants the said steamer was compelled to lay in port, and defendants deny any liability to the libellants for penalties or for any other amount whatsoever.

20 7th. And these defendants, for answer to the eighth article of said libel, deny the breach of contract and liability therein alleged, and, further answering, they aver that said steamer was not in the port of New Orleans, nor registered at said port, when said charter-party was executed; that these defendants, in reference to the tonnage of said steamer, was compelled to rely upon the stipu-

lations of the libellant, and it was incumbent upon him to state said tonnage correctly; these defendants further aver that contracts for the sale of American wheat in Europe are usually made by the cargo, to be cleared in a vessel of specified tonnage, and a variance between the cargo sold and the quantity put on board is cause for the purchaser to avoid the sale and reject the cargo; and it was recognized as such cause of avoidance by the usage of trade existing at the time said charter-party was executed, and generally known to those engaged and concerned in contracts for the sale and delivery and the carrying of cargoes, and according to said usage it is
21 also deemed essential by the parties interested that the cargoes sold should be laden and transported in a vessel adapted to carry the wheat sold as a full and complete cargo to the exclusion of other articles of cargo; that this requisite of conformity between the cargo and the carrying capacity of the vessel is to be deemed to have entered into said charter-party as an essential condition thereof; and these defendants further aver that sales of cargoes of wheat are usually made with reference to vessels of the requisite tonnage already secured, and that relying upon said charter-party for a steamer of eleven hundred tons (1,100), for which a complete cargo would not exceed ninety-seven hundred (9,700) quarters of wheat they contracted to sell and deliver in a port on the continent, between Bordeaux and Antwerp, the cargo of wheat adapted to a vessel of eleven hundred (1,100) tons, and to be a full and complete cargo for a vessel of that tonnage, which contract to sell and deliver it was impracticable to fulfill by using said steamer of an actual capacity greatly in excess of eleven
22 hundred tons (1,100), the tonnage stipulated in said charter-party, except by paying dead freight on the said excess of her actual capacity, or except by loading on board a quantity of wheat beyond that for which these defendants had contracted to sell and deliver as hereinbefore alleged, which would have also exposed the entire cargo to rejection by the purchaser. These defendants show that the tonnage of a vessel being susceptible of exact statement is the standard of measure of the carrying capacity of vessels in charter-parties, and their fulfilment in contracts based upon charter-parties. And these defendants aver that by reason of this fact, and said variance between the stipulations of the charter-party in respect to tonnage and said actual tonnage, and capacity of said steamer, the said charter-party became void, and no cause of action ever accrued to the libellant.

8th. And these defendants, further answering, say that when libellant demanded the lading of the cargo specified in said charter-party, and these defendants insisted that the said steamer
23 did not conform to the stipulations in that regard, and that in this condition of things, the libellant, after the aforesaid demand and protest of libellant, the libellant engaged, to wit, on the 1st of October, 1879, and begun to take on board another cargo procured from other parties for said steamer, to wit:

Bales of cotton and sundry tons of oil-cake, and sundry thousand staves and other cargo on which there was stipulated to be paid

freight by the shippers on said cotton one-half penny per pound, and 5 per cent. primage on said oil-cake — per ——; on said staves — per ——; which other cargo was received and completely laden on said steamer by the seventeenth (17) of October, 1879; and said steamer actually departed on her voyage to Liverpool with said other cargo on board on the eighteenth of October, 1879; and these defendants aver that the freight that will be earned by said steamer on said other cargo will amount to upwards of ($23,000) twenty-three thousand dollars, is an amount largely in excess of the freight stipulated to be paid on the cargo named
24 in said charter party, so that even if it were true that these defendants had violated said contract, no damage whatever has been sustained or was recoverable by the libellant, as in case of said violation it would have been obligatory upon him to seek and procure another cargo, the freight on which under the law would have to be allowed against any claim for damages by libellant. And these defendants insist and claim that if under the facts they can be held to any liability whatever to libellant, which they deny, then and in that event that the freight on said other cargo be allowed and deemed to be in full extinction of all and every claim of said libellant arising under said charter party.

9th. And defendants further aver and answer, that in consequence of said variance of the actual tonnage and capacity of said steamer with the tonnage and capacity stated in said charter-party, they were constrained, on September 24th, 1879, to charter another vessel, to wit, the Ben. Varlich, to carry said cargo stipulated in said
25 charter-party to be transported in the said steamer, and which these defendants had contracted to sell and deliver, and for said other steamer these defendants had to pay a higher rate of interest than stipulated in said charter-party.

10th. That all and singular the premises are true.

Wherefore defendants pray that this honorable court will pronounce against the libellant's demand, and decree the same to be dismissed with costs.

(Signed) J. B. CAMORS & CO.
By J. B. CAMORS.
" J. B. CAMORS.
" JOHN H. JACKSON.

Sworn to and subscribed before me, this 20th October, 1879.
Signed K. LOEW,
U. S. Comm'r.

H. C. AND B. K. MILLER, *Proctors.*

Supplemental and Amended Answer. Filed November 10th, 1879.

U. S. District Court.

EDWARD H. WATTS
vs.
J. B. CAMORS & Co. & *als.* } No. —.

Now come the defendants herein, and to correct some in-

26 accurracies and supply omissions in their original answer, beg leave to amend their said original answer by substituting for the seventh (7th) article of their said answer the following, to wit:

7th. These defendants, for answer to the eighth (8th) article of said libel, deny that they are indebted to the libellant in any amount whatever; and further answering, these defendants say that contracts for the sale of American wheat are usually made by the cargo, to be transported from the United States by vessels chartered for the purpose by the venders of the wheat; that to comply with said contracts of sale and to prevent the rejection of the cargo by the purchaser, it is requisite that the cargo, put on board the vessel for delivery to the purchaser, should conform with the quantity sold, and that this requisite at and before the execution of the charter-party sued upon, was recognized and enforced in usage and known to all interested. Further answering, these defendants aver that in July, 1879, they made a contract for the sale and delivery by them of a cargo of American wheat, at a port on the Con-

27 tinent of Europe between Antwerp and Bordeaux, said cargo to be of not less than eight thousand (8,000) quarters, nor more than ten thousand (10,000) quarters; that to carry that cargo these defendants executed the charter party sued upon, the agent of the libellant stipulating that said steamer was of eleven hundred (1,100) tons burthen, and these defendants on their part agreeing to furnish the said steamer a full and complete cargo, as appears by the charter-party herein filed; these defendants insist that it was incumbent upon the libellant to state the tonnage of the vessel correctly, and that the stipulation in reference thereto in the charter-party is material; that instead of eleven hundred tons (1,100) the said steamer proved to be of much larger carrying capacity than required, and of the burthen of twelve hundred and three (1,203) tons, by reason whereof these defendants charge that the charter party became void, and no right of action thereon accrued to libellant.

And these defendants pray leave further to amend the 8th article of their original answer by adding thereto the following allegations, to wit:

28 8th. These defendants show that the other cargo taken on board said steamer, referred to in the eighth (8) article of said answer, was as follows, to wit: Five thousand three hundred and ninety-one (5,391) bales of cotton, one hundred (100) tons of oil cake, two thousand (2,000) staves, on which there was stipulated and agreed to be paid by the shippers thereof the following rates of freight, to wit: On the cotton, one half-penny per pound and 5 per cent. primage; on the oil cake, twenty-four (24) shillings per ton, and on the staves, from six to ten pounds per thousand, and that the net freight on said other cargo taken on board said steamer will amount to twenty-three thousand ($23,000) dollars; that said other cargo was begun to be laden on board said steamer on the 2nd of October, 1879, within three days immediately succeeding the lay days stipulated in the charter party, and before the expiration of the demurrage to

which the defendants would have been entitled if said charter party had been binding upon them, and said other cargo was completely laden on board, and said steamer sailed, as alleged in the
29 eighth (8th) article of said original answer.

Wherefore these defendants, reserving and reaffirming all the allegations of their original answer, except as corrected and amended herein, pray that this supplemental and amended answer be filed, and that this honorable court will pronounce against the libellants' demand, as prayed for in their original answer.

(Signed) J. B. CAMORS & CO.,
Per JOHN H. JACKSON.
" JOHN H. JACKSON.
" J. B. CAMORS & CO.,
Per J. B. CAMORS.
" J. B. CAMORS.

Sworn to and subscribed before me, this 29th Oct'r, 1879.
(Signed) K. LOEW,
U. S. Comm'r.

(Signed) HENRY C. MILLER,
" BRANCH K. MILLER,
Proctors for Defendants.

Let this supplemental and amended answer be filed.
November 10th, 1879.
(Signed) EDWARD C. BILLINGS, *Judge.*

30 *Amended Answers. Filed January* 19, 1880

To the honorable the judge of the district court of the United States for the district of Louisiana:

The supplemental and amended answer of J. B. Camors & Co., in the suit of E. H. Watts *vs.* J. B. Camors & Co., No. —, of the docket of this court, respectfully shows:

That in their answer herein previously filed, it is erroneously and through inadvertence stated that respondents had made the contract to deliver the wheat which the Highbury was designed to carry, and that respondents shipped that cargo by the Ben Orlich.

Respondents show that after they chartered the said steamship Highbury, they assigned the charter to Gordon and Gomilla and it was that firm that had made the said contract to deliver the wheat designed for the Highbury, and it was that firm that shipped the cargo per the Ben Orlich, and not respondents.

Wherefore respondents, maintaining and reaffirming all
31 their defences in their original answers, except as herein modified and corrected, pray the leave of the court to file this amended answer and for judgment in their favor as prayed for in their answer and for general relief.

(Signed) HENRY C. MILLER,
Proctor for Respondents.

Let this amended answer be filed.
January 19th, 1880.
(Signed) EDWARD C. BILLINGS, *Judge.*

Submission. Extract from Minutes 19th Feb'y 1880.

E. H. WATTS
v.
J. B. CAMORS & Co, } No. 11452.

The trial of this cause was this day resumed and after hearing further argument the court took time to consider.

Judgment Libel Dismissed. Extract from Judgment Book.

This cause came on to be heard at the present term of the court, and was argued by counsel, and thereupon on consideration
32 thereof it is ordered, adjudged and decreed that the libel in this cause be and the same is hereby dismissed at libellant's cost.

Judgment rendered April 13th, 1880.
Judgment signed April 14th, 1880.
(Signed) EDWARD C. BILLINGS, *Judge.*

Order of Appeal. Extract from Minutes, April 14th, 1880.

E. H. WATTS
vs
J. B. CAMORS & Co. } No. 11452.

On motion of J. R. Beckwith, proctor for libellant, and on suggesting to the court that the libellant herein feels aggrieved by the judgment herein dismissing the libellant with costs, and believes that there is error therein to his prejudice: It is ordered that the said libellant be, and is hereby, allowed an appeal from said final decree herein to the circuit court of the United States for the district of Louisiana, returnable, as the law directs, at the next term
33 of said court upon giving bond with good and solvent security in the sum of $250. Conditioned as the law directs.

Appeal Bond. Filed April 17th, 1880.

UNITED STATES OF AMERICA:

District of Louisiana, District Court of the United States. No. 11452.
In Admiralty.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 11452. Appeal Bond.

Know all men by these presents, that we, E. H. Watts, as principal, and A. B. French, of the city of New Orleans, as surety, are held and firmly bound unto John B. Camors and J. H. Jackson, copartners under the style of J. B. Camors & Co., in the sum of two hundred and fifty dollars, to be paid to the said J. B. Camors and J. H. Jackson, defendants, for the payment of which, well and truly to be made in lawful money of the United States, we bind ourselves, and each

of us, our, and each of our heirs, executors, and administra-
34 tors, jointly and severally, firmly by these presents. Sealed with our seal, and dated at New Orleans the 17th day of April, 1880.

Whereas the above-named E. H. Watts, libellant, has appeal- to the next term of the circuit court of the United States for the 5th circuit and district of Louisiana, from a final judgment of the district court of the United States for said district, rendered against him on the 13th day of April, 1880, and signed on the 14th day of April, 1880, in the above-entitled cause:

Now, therefore, the condition of this obligation is such, that if the above-named appellant shall prosecute his appeal to effect and answer all damages and costs, and satisfy whatever judgment may be rendered against him, if he fail to make his appeal good, then this obligation to be void; otherwise, the same shall be and remain in full force and effect.

(Signed) E. H. WATTS,
Per J. R. BECKWITH, *Proctor.*

(Signed) A. B. FRENCH.

Signed, sealed, and delivered in the presence of—
J. R. BECKWITH.

35 Approved:
(Signed) EDWARD C. BILLINGS, *Judge.*

A. B. French, surety on the within appeal bond, being duly sworn, says that he resides in this city, and is worth the sum of $800 over and above his just debts and liabilities.

(Signed) A. B. FRENCH.

Sworn to and subscribed before me, this 17th day of April, 1880.
(Signed) R. DEVONSHIRE, *D'y Clk.*

36 *Opinion and Decree. Entered and Filed November* 7, 1881.

United States Circuit Court, Fifth Circuit & E. D. Louisiana. In Admiralty.

E. H. WATTS *vs.* J. B. CAMORS & Co.

On appeal from the district court.

This cause, tried and submitted at the last term, grows out of a charter party entered into between the parties at the city of New Orleans, on the seventh day of August, 1879.

The charter party is in nearly the usual form, and only there quotations from it are necessary to present the case as it stands before the court:

"1st. This charter party, etc., between A. B. French & Co., agents for the owners of S. S. Highbury, of the burden of 1,100 tons, or thereabouts, register measurements, due here between the 10th and 20th of Sept'r, of the first part, &c.

"2d. The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo, say about 11,500 quarters of wheat in bulk, and pay, &c.

37 "3d. To the true and faithful performance of all and every of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, and also the said vessel's freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of freight."

The evidence taken in the case shows that the "Highbury" arrived on time, say September 9th, and on the 11th of September reported to the defendants as ready to comply with the terms of the charter-party.

The defendants replied by letter on the 12th of September, as follows:

NEW ORLEANS, *Sept.* 12, 1879.

JACOB GARSON, *Master S. S. Highbury.*

DEAR SIR: We have received your notification stating that the S. S. Highbury, under your command, is ready for cargo, and have transmitted said notification to Messrs. Gordon & Gomilla, to whom we have sold the charter of said vessel.

38 These gentlemen return for answer that they decline to accept said vessel under said charter on the ground that the actual tonnage is greater than expressed in the charter. They further call upon us to deliver a steamer of the size mentioned, and we also call upon you to do the same.

Yours truly,

(Signed) J. B. CAMORS & CO.

On the 20th of September defendants wrote to the master of the Highbury declaring themselves released from the obligations of the charter-party, and calling for a similar steamer.

The "Highbury" waited the necessary time, and September 30th the master of the Highbury made public protest, which was served on the defendants, and thereafter the Highbury took on a cargo of cotton and oil cake and sailed for Liverpool.

The actual tonnage of the Highbury was 1,203 tons, and the ship could carry about 11,500 quarters of wheat.

A ship of 1,100 tons cannot carry over 9,500 to 10,000 quarters of wheat.

It appears that in dealing with cargoes of wheat in bulk usage allows a margin of ten per cent. either way, but no more.

39 The libellants demand judgment for the full amount of the estimated freight, the penalty for default stipulated in the charter-party.

The defendants claim that the representation in the charter-party of the register measurement of the Highbury was a substantive part of the contract amount to a warranty, and as the Highbury's actual tonnage largely exceeded the representation by over one hundred

tons, the defendants had a right to reject the ship and disregard the charter.

And the defendants further claim that as they rejected the ship at once, it was the duty of the master and owners to at once have taken in other cargo, lessening any damages that might follow from the avoidance of the charter party, and that in fact thereafter the ship did receive a more valuable freight, and therefore was not damaged at all by the conduct of the defendants.

The first question to decide is as to the effect of the misde-
40 scription of the register measurement of the Highbury.

There is much evidence bearing on the customs and usages prevailing among shippers of wheat as to the size of cargoes, and what will avoid contracts for grain in bulk. And in this case there is evidence tending to show that charterers had no wheat to ship, and that freights were lower in September, 1879, than in August; and also tending to show that defendants were informed, before charter-party was made, of the actual carrying capacity of the Highbury; but all of this is immaterial in the view I take of the contract.

The contract, taken as a whole, can be made effective only by considering the representation of the register measurement as descriptive merely. In fact, the evidence shows that it was known to neither of the parties at the time the charter-party was entered into.

The real consideration of the contract was in the course of things, the carrying capacity of the ship, and this is shown by the agree-
ment on the part of defendants to furnish a cargo of say
41 about 11,500 quarters of wheat.

As the defendants ask the court to construe the agreement, it would be necessarily void at the option of the defendants. If a ship of 1,100 tons carrying capacity had been tendered, they could reject it, as it would not carry about 11,500 quarters of wheat, the stipulated amount of cargo. If a ship were tendered able to carry a cargo of 11,500 quarters, then they might reject it, as they have in this case, because the tonnage was over 1,100 tons register measurement. In other words, the charter-party was binding on the owners, but the charterers might use their pleasure. The court cannot give any such construction, as the terms of the charter-party do not warrant it.

The description in the charter-party of the register measurement of the Highbury was a mere representation and not a warranty, and as it was not fraudulent, and did not entrap or mislead the defendants, will not vitiate the contract, although the actual measurements exceeded the representation by some one hundred tons.

See Asbumer *vs.* Balchen, 3 Selden 262.
42 Baker *vs.* Windle, 6th Ellis & Black, 675.
Thomas *vs.* Clark, 2d Starkie R., 450.

The authorities cited by defendants' proctor all cover cases where the misrepresentations affected the time of receiving or delivering the cargo, or of the sailing or arrival of the vessel, which may well enter into the object and consideration of the contract.

To my mind it is clear that the defendants were in default for not complying with their contract, and are liable for the damages resulting. What is the rule of damages is to me a very serious question.

The libellants claim that, as the contract was entered into in Louisiana, the law of Louisiana forms part of the contract, and that under that law (Civil Code, art's 2117 to 2129) the full amount of the stipulated penalty—the estimated amount of freight—is claimed.

The defendants claim that the charter-party is an admiralty contract, to be enforced and construed by the settled principles of admiralty law, wherever the contract is made that is usually made on land, must be made somewhere, but, wherever made, does
43 not change or affect the principles of admiralty law which a a court of admiralty enforces; and they claim under the admiralty and commercial law that the stipulated penalty in this case in the charter-party should not be treated as legitimate damages, but as a mere covenant to pay actual damages.

The learned proctors on each side have made strong arguments, well supported by authorities, that for the libellant being particularly logical and forcible, and almost compelling conviction, but for the harsh results following its application.

And it may be here noted that under the Louisiana law as claimed, it is only where there is a total breach that the total amount of the penalty can be exacted.

See Revised Civil Code, art. 2127.

The rule of damages as claimed by the defendants is the more equitable. It is the rule that prevails in the commercial world, and is the one recognized in all the text-books.

See 1st Parson's Admiralty Law, pp. 247 & 248.
Story on Contract, sec. 1022 *d*.
Sedgwick on Damages, p. 436, ¶ 301.
Conkling's Admiralty, *verbo* Affreightment.
44 Abbot on Shipping, page 285.

The harsh rule claimed by libellant may be, and I am inclined to think it is, the law of Louisiana (Revised Civil Code, arts. 2117 *et seq.*), and in her courts or on the law side of this circuit court I might, in proper cases, enforce it, but, sitting in admiralty, enforcing admiralty law, I feel bound to lean to the equitable rule as against the harsh one claimed.

And I am inclined to the opinion that it is the duty of the United States courts, in exercising admiralty and maritime jurisdiction under the constitution, to follow the general principles of the admiralty and maritime law as they are recognized and prevail in the commercial world, rather than a narrow local law, which may happen to prevail where a charter-party happens to be made, and which law was evidently not in the minds of the contracting parties. And there is authority for this position.

See 1st Peters, page 104, Thompson *vs.* Catharrina.
2d Story, p. 456, The Barque Chruson.

The reasoning in Neves *vs.* Scott, 13th Howard, p. 268,
45 would seem to apply to the admiralty and maritime law, as well as to the equity jurisdiction and law controlling the courts of the United States.

On the whole I am disposed to hold in this case that the penalty stipulated in the charter-party cannot be considered as liquidated damages between the parties, but that the libellant can recover only the actual damages suffered by the default of the charterers.

These actual damages are for, 1st, the expenses incurred in fitting the Highbury to receive a cargo of grain; 2d, the delay after the expiration of the lay days stipulated in the charter-party, in obtaining and loading another cargo to be allowed at the rate fixed in the contract; 3d, the loss, if any, of freight on the cargo obtained, as against that contracted to be furnished by the defendants.

The defendants claim that it was the duty of the master and agents of the Highbury to have immediately sought another cargo on the first refusal of the defendants to accept the ship, and not have waited until the lay days had expired.

46 Perhaps in some cases this might be so, but in this case I doubt if the master of the Highbury had a right to consider the first letter as a final refusal. The evidence of French, agent, is that he applied to Camors, defendant, for leave to load other cargo, and that Camors refused; and there was talk of arrangement and compromise, and even as late as September 29th letters in relation thereto passed between the parties. And each side during the lay days was threatening the other with claims for violation of the contract. So I think the master and agent of the Highbury had a right, and it was their duty to wait such a time as was necessary to put the defendants clearly in default.

A reference is necessary to ascertain the damages recoverable by the libellants before a final decree can be entered.

The following provisional decree will be entered, to be followed at the proper time with a final decree, and a finding of facts and law:

E. H. WATTS
vs.
J. B. CAMORS & CO. } In Admiralty. On Appeal.

47 This cause came on to be heard on transcript of appeal and the evidence, and was duly argued, and the court, being advised in the premises, and finding the facts and law to be with the libellant and against the defendants, doth order that this cause be referred to A. E. Billings, Esq., a commissioner of this court, to ascertain from the evidence therein and to be submitted, and to report without delay to the court the amount of damages libellant is entitled to recover from the defendants in accordance with the written opinion this day filed; and that thereupon and after due homologation, a final decree for the amount so ascertained be entered in favor of libellant and against defendants, and for all costs.

(Signed) DON A. PARDEE,
Circuit Judge.

Commissioner's Report. Filed March 29th, 1882.

U. S. Circuit Court, Eastern District of Louisiana.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 9096.

48 On November 7th, 1881, this honorable court rendered the following provisional decree in the above-numbered and entitled cause, to wit:

"This cause came on to be heard on transcript of appeal and the evidence, and was duly argued; and the court being advised in the premises, and finding the facts and law to be with the libellant, and against the defendants, doth order that this cause be referred to A. E. Billings, Esq., a commissioner of this court, to ascertain from the evidence therein, and to be submitted, and report without delay to the court the amount of damages libellant is entitled to recover from the defendants, in accordance with the written opinion this day filed; and that thereupon, and after due homologation, a final decree for the amount so ascertained be entered in favor of libellant and against defendants, and for all costs."

In the written opinion, the court stated that the actual damages to be recovered by libellants are:

1. "The expenses incurred in fitting the 'Highbury' to receive a cargo of grain."

49 2. "The delay after the expiration of the lay days stipulated in the charter party, in obtaining and loading another cargo, to be allowed at the rate fixed in the contract."

3. "The loss, if any, of freight on the cargo obtained as against that contracted to be furnished by the defendants."

I consider that the opinion and provisional decree settled the question of the carrying capacity of the "Highbury" *quoad* her liability to carry 11,500 quarters of wheat, according to the contract, but from the testimony taken since the submission, defendants do not so consider, and specially object to said amount as being correct, and claim that she be a carriage of 9,622 quarters.

It is admitted that the "Highbury" was of 1,203 tons net register.

Jacob Garson, a witness for libellant, testified: "The Highbury had the capacity to take on board and carry 11,500 quarters wheat in bulk, of the weight of 480 lbs. per quarter." (Rec., p. 21.)

J. B. Camors, defendant, testified: "This vessel is 1,203 tons.

50 A vessel of 1,203 tons ought to be able to carry between ten and eleven thousand quarters. A vessel of eleven hundred tons could carry between 8,500 and 9,500 quarters." (Rec., p. 44.)

A. J. Gomila, witness for defendants, testified: "The 'Highbury' was 1,203 tons net register. I think the 'Highbury' would have carried 1,200 quarters." (Rec., pp. 71–72.)

A. B. French, witness for libellant, testified: "The 'Highbury' could have carried 11,500 quarters." (Rec., p. 137.) In his testimony taken before me January 30th, 1881, (pp. 1–3), he says he has examined data from which he could determine the approximate carrying

capacity per ton in wheat of steam vessels of the class of the "Highbury," and finds as follows: "The 'Stag' she took 9,613 quarters. She is 1,006 tons, net register, which is equal to 9½ quarters per ton; the 'Robena,' 1,181 tons, 90,500 bushels of wheat, equal to 9½ quarters per ton; the 'Topaz,' 1,265 tons, 96,000 bushels, or 9⅜ quarters per ton; the 'Cheswick,' 796 tons, carried 64,946 bushels, equal to 10⅛ quarters per ton; the 'Marellos,' 1,109 tons, 86,000 bushels, equal to 9⅝ quarters per ton; the 'Birdswill,' 1,204 tons, 96,000
51 bushels, equal to 9⅝ quarters per ton. That is a sister ship to the 'Highbury.'" He says: "I got this data from clearances and from the evidence of Mr. Miller, (A. K.), and books he gave me this morning. These vessels I have named sailed from this port. The Plimsoll or load line of the 'Highbury' was changed on her return home from the voyage to this port in October, 1879, the effect of which was to lessen her carrying capacity."

Henry W. O. Edge, of New York, whose testimony was taken under commission, says that on September 6th, 1880, the "Highbury" carried from New York to Rotterdam 65,265 bushels wheat, 20,605 bushels of corn, and 3,000 sacks of flour, weighing 147 $\frac{2}{2}\frac{2}{4}\frac{0}{0}$ tons, from which Mr. French, in his testimony, estimates the carrying capacity of the 'Highbury,' if loaded that deep with wheat, at 11,250 quarters, about; not less. (—, pp. 3–4.) This was after her capacity had been diminished.

Capt. James Cowel, for libellant, testified that a good cargo for the "Highbury" would be from 11,000 to 11,600 quarters.

52 Against all the foregoing evidence there is the following for defendants:

Capt. A. K. Miller, in his testimony before me on December 20, 1881, was asked, "What would be a full and complete cargo of wheat from this port to Liverpool for a vessel of 1,100 tons?" A. "The size of steamers somewhat vary in their measurement, but on the whole I find that a steamer will carry about 8 quarters of grain. * * * That is about the average. (Rec. p. 12.)

Capt. Miller was evidently mistaken in his estimate of the average carrying capacity of his steamers, for from the list of vessels he had loaded as given Mr. French by him they averaged 9 $\frac{3}{4}\frac{5}{8}$ quarters to the ton; and the "Birdswell," the sister ship to the "Highbury," carried from this port 9⅝ quarters to the ton, and at which rate the "Highbury" could carry 11,700 quarters.

C. H. Cummings, of Philadelphia, under commission, testified that on January 7th, 1880, he loaded the "Highbury" at that port for Bremerhaven with 86,350 bushels corn, equal to 10,794
53 quarters, and on January 7, 1881, he loaded her at the same port for Antwerp with 84,144 $\frac{2}{6}\frac{0}{0}$ bushels wheat equal to 10,518 quarters.

From all the foregoing testimony I am satisfied that the "Highbury," at the time this charter party was made, had ample capacity for carrying 11,500 quarters of wheat.

The expense of fitting the Highbury for a grain cargo as claimed by libellants is not contested by defendants, except as to the amount charged for commissions.

Libellant claims 5 per cent. on the gross amount of each cargo; defendants object to a greater charge for commissions than 2½ per cent.

In the testimony taken before me Dec. 17th, 1881, (p. 20,) French testified: "The usual charge is 5 per cent.; we have to make a division of that commission with several people, freight brokers, etc., and (on p. 30) he says on cross-examination that he has not been paid those commissions, but "I am going to have it if the money can be made out of the defendant."

54 Mr. Le Blanc, witness for defendants, also a ship broker here, in his testimony taken before me on December 20th, 1881, (Rec. pp. 4–6) says he is familiar with the rates paid to brokers in this port as commissions for securing cargoes of cotton, and according to his experience they are 2½ per cent., and the brokers he employs are paid out of that.

On the same day Capt. Miller, for defendants, testified (Rec. pp. 11–12) that the usual rate paid brokers for procuring cargo is 2½ per cent., and on charters it is more often ½ of 5 per cent.

On the same day Mr. Gomila, for defendants, testified (pp. 39–41) to the same effect. The objection to more than 2½ commission is sustained.

The charter party allowed 15 lay days, Sundays excepted; they expired on September 27, and on October 10 the vessel cleared, which makes 21 days. It is claimed by libellant, and conceded by defendants, that libellant is entitled to demurrage for those 21 days, and also for 5 additional days on the other side, making in all 26 days, at £50 per day, as per contract.

55 Defendants' object to the item of expense charged against the cotton cargo of $110 for cables as unnecessary. The objection is sustained.

Defendants also submitted to me the statement of expenses marked "A," offered in connection with Mr. French's testimony (p. 40) taken before me December 17, 1881, to ascertain if they have been proven necessary and proper. I am satisfied as to the correctness of each item, except, 1, the commissioner's, which I reduce from 5 to 2½ per cent.; 2, cables, $110; and 3, drayage, $37.75, all of which items are disallowed. And I find as per detailed statement below that:

1. The expenses incurred in fitting the "Highbury" to receive a cargo of grain amount to the sum of $1,158.96.

2. The delays, after the expiration of the lay days stipulated in the charter party, &c., as agreed upon between libellant and defendants, are 26 days @ £50 per day, @ $4.84, which I find the value of the pound sterling, amounts to the sum of $6,292.00.

3. I find that there was no loss of freight on the cargo obtained as against that contracted to be furnished; on the contrary, there is a net gain of $532.16.

I have allowed 5 per cent. interest on the amount ascertained to

be due as damage from the day of the filing of the libel
56 as per the following tabulated statement:

Gross amount of wheat cargo 11,500 quarters @ 7s 6d £4.312 10s @ $4.84		$20,872 50
Less expenses of fitting, as follows:		
Carpenter's bill	350 00	
Wharfage at Gretna	92 65	
Cost of trimming	149 50	
Commissions on $20,872.50 @ 2½ per cent	546 81	
Inspector's certificate	20 00	
		1,158 96
Net amount of wheat cargo		$19,713 54
Add 26 days demurrage, @ £50 @ $4.84		6,292 00
Net amount of wheat cargo and demurrage		$26,005 54
Gross amount of cotton cargo as per freight list, 5,391 B. C., 1,000 sacks oil cake, 3,600 staves. £5,730-16-1 @ $4.84		$27,737 07
Less expenses proven, as follows:		
Towage from Gretna	25 00	
Levee dues in New Orleans while loading	227 95	
Compressing 5,391 B. C., @ 50c.	2,695 50	
Pullers on 4,500 B. C., @ 10c.	450 00	
Hire of tarpaulins	55 00	
" " " for 85 B. C. on deck	120 00	
Advertising for cargo	15 00	
Extra insurance on 85 B. C. on deck	23 00	
Watching cargo	45 00	
Stowing cargo	2,791 50	
Coal and men attending winches	350 00	
Commissions on $27,737.07 @ 2½ per cent.	693 40	
		7,491 37
Net amount of cotton cargo		$20,245 70
57 From net amount of wheat cargo and demurrage		$26,000 54
Deduct net amount of cotton cargo		20,245 70
Amount of libellant's damage		$5,759 84
To which add 5 per cent. interest thereon from October 10, 1879, date of the filing of libel, to March 24, 1882, 2 y'rs, 5 mo's, 15 days		707 98
Amount due libellant by defendants, and costs		$6,467 82

Respectfully submitted.
(Signed) ALFRED E. BILLINGS,
U. S. Com'r.

Motion & Order. Report of Commissioner Assigned for Hearing. Entered & Filed March 29, 1882.

Circuit Court of the United States, Eastern District of Louisiana.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 9096.

On motion of J. R. Beckwith & —— Nixon, proctors for libellant, and on suggestion to the court that Alfred E. Billings, Esq., commissioner, to whom this cause was referred to ascertain the amount of damages which the libellant should recover, has
58 and returned his report in that behalf, and that the same is on file in this court—

It is ordered that this cause be set down for hearing thereon on the question whether said report should be confirmed and adopted, and judgment be rendered thereon, and that defendants be notified thereof, and that said hearing be fixed for Monday, April 3d, A. D. 1882, at 11 a. m., and that all objections or oppositions thereto be filed on or before the first of April, A. D. 1882, and that the court fix the compensation of the commissioner.

Exceptions Filed April 1, 1882.

U. S. Circuit Court.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 9096.

The defendants, without assenting in any manner to the principles of liability maintained in the decree, file the following exceptions to the master's report made in pursuance of that decree:

The defendants except to the allowance by the master of twenty thousand eight hundred and seventy-two dollars for
59 freight that would have been earned on the wheat cargo for the Highbury, stipulated in the charter party sued upon, the estimate of the master being based upon an assumed capacity of said Highbury of eleven thousand five hundred quarters of wheat, the testimony establishing, as defendants submit, that she could have carried said cargo on a voyage from New Orleans to the place or places designated in the charter; but def'ts insist her full carrying capacity from N. O. to said places, making proper allowance for coal requisite to be carried, was not in excess of nine thousand six hundred and twenty-two quarters of wheat, on which the freight would have been seventeen thousand three hundred and nineteen $\frac{60}{100}$ dollars, to which said allowance by the master should be reduced and restricted.

And defendants herewith file and make part of this exception the exception and statement on this branch of the case filed before the master.

Defendants further except to the interest allowed by the master, on the ground that interest can run only from date of the judgment.

60 Wherefore def'ts pray that said items excepted to herein may be stricken out of said report and excluded from any judgment this c't may render in the premises.

(Signed) H. C. MILLER,
Per J. W. G., JR.
J. W. GURLEY, JR.,
Proctors for Def'ts.

Statement & Exception Referred to in the Foregoing Exceptions.

As to cargo the Highbury could carry: Her capacity has been actually tested. She carried from Philadelphia to the continent 84,144 bushels of wheat, which, at 8 qu'rs to the ton, gives 10,518 quarters. (Testimony of Cummings under commission.)

From New York she carried 87,608 qu'rs to the continent, equal to 10,951.

Her carrying capacity from New Orleans would be diminished by the greater quantity of coal she would have to carry from New Orleans. The length of the voyage is, say from 7 to 8 days longer than from Philadelphia. The daily consumption of coal is, say from 16 to 17 tons per day; taking 7 days as the minimum

61 and 16 tons as the maximum, a vessel would require from New Orleans to the Continent 112 tons more of coal than from Philadelphia. Her carrying capacity for the cargo would thus be diminished from New Orleans by 112 tons, equal to 896 qu'rs, allowing 8 qu'rs to ton. See testimony Miller, test'y, p. 13 to 14.

Adopting, then, her carrying capacity from Philadelphia, say	10,518 qrs.
Diminished by the additional tonnage required for coal	896 qrs.
	9,622 qrs.

That is, the grain cargo from New Orleans cannot be estimated at more than 8,622 quarters, instead of 11,500 quarters, assumed as a basis on the other side for the value of the grain cargo—the grain cargo, *i. e.*, 9,622 qu'rs, at the rate stated in the charter party, would produce $17,319.60.

The respondents, therefore, specially object and except to the item of $120,700, assumed from value of the grain cargo, claimed by libellant in the statement of Mr. French, and respondents claim and insist that cargo cannot be estimated higher than $17,319.60.

Putting the cargo at	$17,319 60
And deducting his items in reduction are all one	1,647 15
Value of grain cargo	15,672 45

62 As to cotton cargo:

Adopting its valuation fixed by Mr. French, say		$26,333 00
Submitting to the comm'r the items in reductions as stated by Mr. French whether they are proved	8,397 12	
Specially objecting to the item of 5 per cent. commission, and excepting thereto, insisting it should be 2½ per cent. only, am't'g to $725.71	725 71	
Makes the charges		7,671 41
		$18,661 59

See test. Miller, p. 11; L. Munc, p. 5.

This makes the cotton cargo of the value of	18,661 59
Increasing the value of the grain cargo by diminishing the commissions 5 per cent. to 2½ per cent. on $17,319.60, making commmissions to be deducted $603, instead of $1,035, as makes that cargo amount to	16,275 45
Difference in favor of cotton cargo	2,386 14

And respondents object and except to the item claimed by libellant of the difference assumed in favor of the grain cargo, say $1,116.97, and respondents claim and insist that they are to be credited with $2,386.14, as against any and all claim for damages on the other side.

63 As to demurrage:

The charter allowed fifteen days, Sundays excepted, to land and discharge cargo, to run from the notification, *i. e.*, the 11th Sept.; they expired on the 27th Sept.; from the 28th, inclusive, the demurrage begins.

The vessel cleared on the 18th Oct. See clearance, Rec., p. 94. She was at liberty to sail on the 19th. The demurrage days from 28th Sept. to 18th Oct. are ---------- 21 days.

For demurrage on other side, Miller puts it at 3½ days; French says about 6; McLelland would make it more; test., p. 23, adopt a medium, say ---------- 5 days.

26 days.

Twenty-six days, at $250 per day, would be $6,500. Respondents object and except to any allowance for demurrage in excess of said $6,500. Respondents also specially object to the charge for $110 for cables in Mr. French's statement, on the ground it was not a necessary expense.

According to these views the demurrage would be -----	$6,500 00
Credited by the difference in favor of the cotton cargo--	2,386 14
Would leave the damages ascertained under the rules laid down in the decree----------	4,113 86
	110 00
Diminished by striking out charge for cables to--	$4,003 86

Respondents insist and claim that am't, $4,003.86, is all that can be allowed under the decree, and object and except to any greater allowance, without assenting in any manner to the rule of liability stated in the decree, but submitting this statement merely to show that, under the decree, the liability cannot exceed $4,003.86.

64 *Hearing and Submission of Report and Exceptions thereto. Extract from the Minutes.*

November Term 1881.

NEW ORLEANS, MONDAY, *April* 3, 1882.

Court met pursuant to adjournment. Present: Hon. Don A. Pardee, circuit judge.

E. H. WATTS
vs.
J. B. CAMORS. } No. 9096.

This cause came on to be heard on the report of the commissioner and on the exceptions thereto, and was argued by the proctors for the parties respectively, and submitted. And the court took time to consider.

Order amending Report of Commissioner. Entered and filed April 10, 1882.

United States Circuit Court, Eastern District of Louisiana.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 9096. Admiralty. Appeal.

65 On damages reported by commissioner.

The commissioner was instructed by the court to ascertain and report to the court the actual damages suffered by the libellant growing out of the violation of the charter-party by the defendants, because of—

1st. The expenses incurred in fitting the Highbury to receive a cargo of grain.

2d. The delay after the expiration of the lay days stipulated in the charter-party in obtaining and loading another cargo to be allowed for at the rate fixed in the contract.

3d. The loss, if any, of freight on the cargo obtained as against that contracted to be furnished by the defendants.

The commsisioner and counsel seem to have misapprehended the

scope of the order of reference as to the damages to be allowed, and therefore the account is made up on a basis not contemplated by the court, and embracing several items and considerations which the courts rejects, to wit, on the one hand commissions and lay days on the other side, and on the other hand credit for the
66 value of the cotton cargo obtained over the grain cargo refused.

The facts ascertained and reported by the commissioner are full and complete, and there is no difficulty in stating the amount of the damages as contemplated in the order of reference.

Under the first head:

Carpenter's bill	$350 00
Cost of trimming	149 50
Inspector's certificate	20 00
Wharfage at Gretna	92 65

Under the second head:

Twenty-one days, at £50 per day, £1,050, reduced to U. S. currency @ $4.84	5,082 00

Under the third head:

No loss, as the cotton cargo was more valuable than the cargo contracted to be furnished.

Making a total of	$5,693 15

On this amount interest at five per cent. should be allowed from date of filing the libel.

The commissioner has taken a large amount of evidence, which seems to have been necessary, and he has made a careful and
67 elaborate report. A fee of two hundred dollars is a proper allowance for his services.

Ordered, let the roport of the commissioner be amended by striking out the amount allowed for commissions and for lay days on the other side of the water, and credit for excess of freight on cotton cargo over grain cargo, and as so amended, showing damages to the amount of $5,693.15, with interest thereon, from date of filing libel, at 5 per cent., be approved and homologated.

And let a commissioner's fee of two hundred dollars be allowed and taxed, with costs.

(Signed) DON A. PARDEE, *Judge.*

68 *Findings and Decree. Entered and Filed April 12th,* 1882.

UNITED STATES OF AMMEICA:

Fifth Judicial Circuit, Eastern District of Louisiana. In Admiralty.

E. H. WATTS
vs.
J. B. CAMORS & Co. } No. 9096.

This cause came on to be heard on the transcript from the district

court, and the evidence taken in this court, and was argued, and the court, being advised, doth find the following facts in the case:

1st. That on the 7th day of August, 1879, the libellant, E. H. Watts, through his agents, A. B. French & Co., and the defendants, J. B. Camors & Co., at New Orleans, Louisiana, entered into a contract of charter-party, in the words and figures following, to wit:

This charter-party, made and concluded upon in the city of New Orleans, La., the 7th day of Aug., 1879, between A. B. French & Co., agents for the owners of S. S. Highbury, of the burthen of 1,100 tons, or thereabouts, register measurements, due here between
69 10th & 20th of Sept., of the first part, and J. B. Camors & Co., of the second part, witnesseth: That the said party of the first part agrees, in the freighting and chartering of the whole of the said vessel (with the exception of the cabin and necessary room for the crew and storage of provisions, sails, and cables) unto said party of the second part, for a voyage from New Orleans to Havre, St. Hazaire, Antwerp, Bordeaux, or Bremen, orders, on signing bills of lading, on the terms following: The said vessel shall be tight, staunch, strong, and in every way fitted for such a voyage, and receive on board, during the aforesaid voyage, a full and complete cargo, say, 11,500 quarters of wheat in bulk, and pay to the said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, seven shillings and six pence per quarter of 480 lbs. weight delivered in full, payable in cash, on right of delivery of the cargo.

It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from
70 the time the vessel is ready to receive or discharge cargo: Fifteen running days (Sundays excepted) for loading and discharging, lay days to commence when the captain reports the vessel is ready for cargo. And that for each and every day's detention, by default of said party of the second part, or agent, fifty pounds st. per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent. The cargo, or cargoes, to be received and delivered within the fifteen days above specified. The dangers of the seas and navigation of every nature and kind always mutually *accepted*.

To the true and faithful performance of all and every of the foregoing agreements we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, and also the said vessel's freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of estimated amount of freight.

In witness whereof, we have hereunto set our hands, the day and year first above written.

71 (Signed) J. B. CAMORS & CO.
(Signed) A. B. FRENCH & CO.,
ED. GUMPF, *Agent for the Owners.*

2d. That the said libellant complied in all things with the said

contract, and that accordingly the said steamship Highbury arrived in the port of New Orleans prior to the 20th day of September, 1879, and on the 11th day of September, 1879, said steamship so being in the said port, and in all things ready to receive cargo, the master thereof notified the respondents that the said ship was ready to receive and load on board a cargo of wheat in bulk according to the terms of said charter-party, and tendered said ship to respondents according to the terms of the charter-party, and demanded that said respondents should furnish and deliver to said ship a full cargo of wheat in bulk, according as they had contracted in said charter-party.

3d. That the said respondents on the 12th of September, 1879, in writing, refused and neglected to comply with the terms of the said charter-party, and refused and neglected to accept the said
72 ship, and refused and neglected to furnish said ship a full cargo of wheat in bulk, or any part thereof, on the ground and assigning as a reason therefor that the actual tonnage of said ship is greater than expressed in the charter-party.

4th. That the actual tonnage of the said steamship Highbury is and was twelve hundred and three tons, registered measurement.

5th. That at the date af the said charter-party the said steamship Highbury was a new ship, and neither of the contracting parties in New Orleans knew her exact register measurements or tonnage or carrying capacity.

6th. That the negotiations had between the parties preliminary to the contract made between the parties all were with reference to the carrying capacity of the Highbury, which, under the custom among merchants and shippers of grain, might run not exceeding ten per cent. over or under the cargo stipulated for.

7th. That the actual carrying capacity of the Highbury for grain is about 11,500 quarters of wheat, depending upon the length
73 of voyage between coaling stations.

8th. That by reason of the failure of the respondents to accept the said ship and furnish her the cargo stipulated in said charter-party, and by reason of the failure of respondents to comply with their said contract, the libellant has suffered damages to the full sum of five thousand six hundred ninety-three & $\frac{15}{100}$ dollars, with interest thereon at the rate of five per cent. from October 10th, 1879.

And the court finds as conclusions of law as follows:

1st. That the libel filed herein should be maintained, and that libellant is entitled to recover from the respondent- the sum of five thousand six hundred and ninety-three & $\frac{15}{100}$ dollars, with five per cent. interest thereon from October 10th, 1879.

2d. That the respondents should be condemned to pay all costs.

And the court doth thereupon order, adjudge, and decree that the libel filed herein by E. H. Watts against J. B. Camors & Co. be, and the same is, maintained, and that said E. H. Watts do have
74 and recover of John B. Camors and J. H. Jackson, copartners under the firm name of J. B. Camors & Co., *in solido*, the sum of five thousand six hundred and ninety-three & $\frac{15}{100}$ dollars,

with interest thereon at five per cent. per annum from October 10th, 1879, until paid, and all costs of suit, to be taxed.

(Signed) DON A. PARDEE, *Judge.*

Additional Finding of Fact. Entered & Filed April 13th, 1882.

United States Circuit Court, Eastern District of Louisiana.

E. H. WATTS
vs.
J. B. CAMORS. } No. 9096.

In this case the court finds, in addition to the finding of facts heretofore, the following:

1st. The master of the Highbury tendered the ship for cargo on the 11th of September, 1879; on the 12th following the defendants, in writing, refused to accept; thereafter, during the lay days,
75 various negotiations were pending between the parties, until, on the 30th day of September, 1879, the said master caused public protest to be made, before a notary and witnesses, of the neglect and refusal of said defendants to accept said ship.

2d. That thereafter, by the 19th day of October, the said master of the Highbury obtained in the same port a full cargo of cotton and oil cake for said ship, the freight of which exceeded in value that of the wheat cargo contracted to be furnished by said defendants in the sum of 532 & $\frac{16}{100}$ dollars.

3d. And the court further finds that the estimated amount of freight which was the penalty stipulated in the charter-party amounted to the sum of twenty thousand eight hundred and seventy-two & $\frac{50}{100}$ dollars.

The conclusions of law and the judgments heretofore will remain the same.

(Signed) DON A. PARDEE, *Judge.*

Motion & Order for Appeal. Entered & Filed April 20th, 1882.

76 Circuit Court of the United States for the 5th Circuit and Eastern District of Louisiana.

E. H. WATTS
vs.
J. B. CAMORS. } No. 9096.

On motion of H. C. Miller and J. Ward Gurley, Jr., proctors for defendants, and upon suggesting to the court that defendants are aggrieved by the final judgment herein rendered against them on the 12th day of April, 1882, and that they are greatly injured thereby, and are advised that there is error therein to their prejudice, and further suggesting that defendants desire to take a suspensive appeal therefrom to the Supreme Court of the United States—

It is ordered that said defendants be allowed a suspensive appeal from said final judgment herein rendered on 12th April, 1882, returnable in the Supreme Court of the United States on the first day

of its next term, upon giving bond in the sum of seven thousand five hundred dollars, with good and solvent security, condition as the law directs.

April 20th, 1882.

(Signed) DON A. PARDEE, *Judge.*

77 *Motion & Order for Cross-Appeal. Entered & Filed April 21st, '82.*

Circuit Court of the United States for the Eastern District of Louisiana.

E. H. WATTS *vs.* J. B. CAMORS & CO.

On motion of J. R. Beckwith, proctor for the libellant herein, and the said respondents having taken and been allowed an appeal to the Supreme Court of the United States, it is ordered that the said libellant be, and is hereby, granted and allowed an appeal from the judgment herein to the Supreme Court of the United States, returnable at the next October term thereof, and that he give bond, conditioned as the law directs, in the sum of five hundred dollars, with good and sufficient surety.

April 21, 1882.

(Signed) DON A. PARDEE, *Judge.*

Bond for Appeal. Filed May 4th, 1882.

78 UNITED STATES OF AMERICA:

Know all men by these presents, that we, John B. Camors and J. H. Jackson, as principals, and Wm. Gordon, A. J. Gomila, and the firm of Gordon & Gomila, as sureties, are held and firmly bound, jointly and severally, unto Edmund H. Watts in the sum of seven thousand five hundred dollars, lawful money of the United States of America, to be paid to the said Edmund H. Watts, his heirs, executors, administrators, and assigns, for which payment well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated the third day of May, in the year of our Lord eighteen hundred and eighty-two.

Whereas the said J. B. Camors and J. H. Jackson having heretofore, to wit, on the 20th day of April, A. D. 1882, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 12th day of April, A. D. 1882, as
79 appears by the record by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Edmund H. Watts *vs.* J. B. Camors and J. H. Jackson, copartners, No. 9096 of the docket thereof.

Now the condition of the above obligation is, that if the above bounden J. B. Camors and J. H. Jackson shall prosecute their said appeal to effect, and shall answer all damages and costs if they shall

fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

For J. B. CAMORS & CO.,
(Signed) J. B. CAMORS. [L. S.]
For GORDON & GOMILA,
(Signed) A. J. GOMILA. [L. S.]
For GORDON & GOMILA,
(Signed) WM. GORDON. [L. S.]

Bond approved.
(Signed) DON A. PARDEE, *Judge.*

UNITED STATES OF AMERICA, } *ss:*
Eastern District of Louisiana. }

Personally appeared Wm. Gordon and A. J. Gomila, who, being duly sworn, each for himself, deposes and says that he
80 is the surety on the within bond; that he resides in the city of New Orleans, La., and is worth the full sum of seven thousand five hundred dollars, over and above all his debts and liabilities, and property exempt from execution.

(Signed) WM. GORDON.
A. J. GOMILA.

Subscribed & sworn before me, this 3d day of May, 1882.
(Signed) T. V. COUPLAND,
Comm'r U. S. Circuit Court Eastern District of Louisiana.

Bond for Cross-Appeal. Filed May 6th, 1882.

UNITED STATES OF AMERICA:

Know all men by these presents, that we, Edmund H. Watts, as principal, and A. B. French, of the city of New Orleans, as surety, are held and firmly bound, jointly and severally, unto John B. Camors and J. H. Jackson, in the sum of five hundred dollars lawful money of the United States of America, to be paid to the said John
B. Camors and J. H. Jackson, their heirs, executors, admin-
81 istrators, and assigns, for which payment well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 6th day of May, in the year of our Lord eighteen hundred and eighty-two.

Whereas the said Edmund H. Watts having heretofore, to wit, on the 21st day of April, 1882, taken a cross-appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 12th day of April, 1882, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of Edmund H. Watts *vs.* John B. Camors & J. H. Jackson, co-partners, No. 9096 of the docket thereof—

Now, the condition of the above obligation is, that if the above bounden Edmund H. Watts shall prosecute his said cross-appeal

to effect, and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

82

(Signed) EDMUND H. WATTS. [L. S.]
By J. R. BECKWITH, *Proctor.*
(Signed) A. B. FRENCH. [L. S.]

Instructions for making Transcript. Filed August 11th, 1882.

MILLER, FINNEY & MILLER, *Attorneys-at-Law.*

NEW ORLEANS, LA., *Aug. 9th*, 1882.

MY DEAR SIR: In Watts *vs.* Camors the record should embrace—

The pleadings, *i. e.*, the libel and answers, the preliminary decree of this court, including the reference to the master, his report or reports, the exceptions thereto of both parties, the letters of defendants to libellant, one or two written in September, 1879, the final decree of this court, and the findings of fact, original and supplemental, and conclusions of law.

The petitions or motions of appeal, (if libellant as well as def't appealed,) the bonds approved, citations, if any, issued, and return on them in the original.

83

Include all the exhibits annexed to the libel or answers.

From the record in the district court copy the motion, order of appeal to this court, bond, and approval of by d't c't, and date of filing appeal here.

At end of transcript include the entries of trials and submissions in this court.

Y'rs, (Signed) HENRY C. MILLER,
J. WARD GURLEY, JR.,
Proctors.

MR. COUPLAND, *Clerk's off. U. S. C. C.*

84 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 83 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of E. H. Watts *vs.* J. B. Camors & Co., No. 9096 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 12th day of August, A. D. 1882.

Six words erased and two words interlined, approved.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Don A. Pardee, United States judge for the eastern district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United

States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 12th day of August, A. D. 1882.

Two words interlined, approved.

DON A. PARDEE, *Judge.*

85 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to Edmund H. Watts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the second Monday of October next, pursuant to a motion and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Edmund H. Watts is libellant and appellee and J. B. Camors and J. H. Jackson, composing the firm of J. B. Camors & Co., are defendants and appellants, to show cause, if any there be, why the decree rendered against the said J. B. Camors and J. H. Jackson, as in said motion and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 4th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

DON A. PARDEE, *Judge.*

86 [Endorsed:] United States circuit court. No. 9096. E. H. Watts, libellant and appellee, *vs.* J. B. Camors & Co., defendants and appellants. Citation.

Marshal's Return.

Received May 6, 1882, by the U. S. marshal, and on May 6th, 1882, I served a true copy of the within citation of appeal on the within-named Edmund H. Watts, libellant and appellee herein, by handing the same to J. R. Beckwith, Esq., in person, in the city of New [Orleans], the attorney for the aforesaid appellee, who is absent from the district of La.

E. S. CURRY,
D'y U. S. Marshal, East'n D's't of La.

Personally appeared before me E. S. Curry, a lawfull deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a true copy of the within citation of appeal on the appellee herein named, as set forth in his official return herein.

E. S. CURRY,
D'y U. S. Marshal, East. D's't of La.

Subscribed and sworn before me, May 8th, 1882.

T. V. COUPLAND,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

87 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to J. B. Camors and J. H. Jackson, composing the firm of J. B. Camors and Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a motion and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Edmund H. Watts is libellant and appellant and you and each of you are defendants and appellees, to show cause, if any there be, why the judgment rendered against the said J. B. Camors and J. H. Jackson, as in said motion and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of May, in the year of our Lord one thousand eight hundred and eighty-two.

DON A. PARDEE, *Judge.*

88 [Endorsed:] United States circuit court. No. 9096. E. H. Watts, libellant and appellant, *vs.* J. B. Camors and Company, are defendants and appellees. Citation.

Marshal's Return.

Received May 12, 1882, by the U. S. marshall, and on the 15th day of May, 1882, I served a true copy of the within citation of appeal on the defendants & appellees herein named, to wit, J. B. Camors and J. H. Jackson, composing the firm of J. B. Camors & Company, by handing the same to Henry C. Miller, Esq., the attorney of record for the aforesaid defendants & appellees, in person, in the city of New Orleans.

E. S. CURRY,
D'y U. S. Marshal for Eastern D's't of La.

Personally appeared before me, E. S. Curry, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served true copies of the within citation of error on the defendants in error herein named, as set forth in his official return hereon.

E. S. CURRY,
D'y U. S. Marshal for Eastern D's't of La.

Subscribed and sworn before me, June 13th, 1882.

T. V. COUPLAND,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Endorsed on cover: E. Louisiana C. C. U. S. No. 292. J. B. Camors and J. H. Jackson, composing the firm of J. B. Camors & Company, appellants, *vs.* Edmund H. Watts. Filed 3rd October, 1882. And No. 450. Edmund H. Watts, appellant, *vs.* J. B. Camors and J. H. Jackson, composing the firm of J. B. Camors and Company. Filed 24th November, 1882.

115-353

Office Supreme Court U. S.
FILED.
APR 13 1885
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 292

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY, APPELLANTS,

vs.

EDMUND H. WATTS.

No. 450.

EDMUND H. WATTS, APPELLANT,

vs.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Brief of Appellee and Appellant in Cross Appeal by E. H. Watts.

J. R. BECKWITH.
Of Counsel for Libellant and Appellant in Cross Appeal.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 292.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY, APPELLANTS,

vs.

EDMUND H. WATTS.

No. 450.

EDMUND H. WATTS, APPELLANT,

vs.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Brief of Appellee and Appellant in Cross Appeal by E. H. Watts.

STATEMENT OF ISSUES.

On October 10, 1879, Edmund H. Watts, the owner of the British steamship "Highbury," exhibited a libel in the District Court of the United States for the Eastern District of Louisiana, against J. B. Camors and J. H. Jackson, doing business in the city of New Orleans, as co-partners, under the style and firm

name of J. B. Camors & Company, in a cause of contract, civil and maritime.

The libel (record, page 1) averred that on the 7th of August, 1879, the libelant was the owner of the British steamship "Highbury;" that the vessel was well manned and equipped for a voyage at sea, with a cargo, and had full and sufficient capacity to carry 11,500 quarters of wheat from the port of New Orleans to Havre in France, or to any other port on the Atlantic or Mediterranean, or any other port named in the contract of charter party set forth in the libel.

That on the 7th day of August, 1879, the libelant, through his duly authorized agents, entered into a charter party, relating to said steamship "Highbury," with the respondents, J. B. Camors & Company, for a voyage from the port of New Orleans to the port of Havre, St. Nazaire, Antwerp, Bordeaux or Bremen, as the charterer should order or elect at the time of signing the bills of lading.

The contract of charter party was in writing, and set forth *in extenso* in the libel. (Record, page 2.) The owner of the vessel chartered the whole of the vessel, "with the exception of the cabin and necessary room for the crew and storage of provisions, sails and couls," for a voyage to any of the above-named ports, as elected by the charterer.

The charterer agreed to provide and furnish the vessel, for such voyage, a full and complete cargo, "say about 11,500 quarters of wheat in bulk," and pay to the charterer, "for the use of the vessel during the voyage aforesaid, seven shillings and six pence per quarter of four hundred and eighty pounds weight, delivered, in full, payable in cash on right delivery of the cargo."

The lay days for loading and discharging, "if not sooner dispatched," to commence from the time the vessel was ready to receive or discharge cargo, and to be fifteen running days (Sundays excepted), for loading and discharging; lay days to commence when the master reported the vessel ready for cargo, with

fifty pounds sterling per diem demurrage for all delays or detentions caused by the fault of the charterer.

The vessel was to be in the port of New Orleans, ready for cargo, between the 10th and 20th days of September, 1879, and was recited in the charter party to be "of 1100 tons, or thereabouts, registered measurement."

The last clause or covenant in the charter party was the following mutual covenant:

"*To the true and faithful performance of all and every one of the "foregoing agreements, we, the said parties, do hereby bind ourselves, "our heirs, executors, administrators and assigns, and also the said "vessel, freight, tackle and appurtenances, and the merchandise to "be laden on board, each to the other, in the penal sum of estimated "amount of freight.*"

That the vessel arrived in the port of New Orleans before the 20th of September, 1879, as agreed in the charter party; that on the 11th day of September, 1879, the vessel was in all things ready to take on board the full amount of 11,500 quarters of wheat, and perform all of the obligations of the charter party bearing on the vessel and its owner; that on the 11th day of September, 1879, the charterer was duly notified of the fact that the vessel was ready for the stipulated cargo; that the charterer refused to provide or load the cargo stipulated; that the vessel lay ready to receive the stipulated cargo for the entire fifteen lay days named in the charter party, not including Sundays in the computation; that no cargo being provided, the master demanded damages and penalty of estimated freight, which was refused; that on the 30th day of September the master of the steamship made notarial, public protest (set forth *in extenso* as exhibit A, filed with the libel, record, page 4). This protest, after reciting the charter party, tender of the vessel, refusal to provide cargo, the expiration of stipulated lay days, demand for indemnity, protested against the violation of charter party by charterers, and declared the intention of the owners of the "Highbury"

to hold charterers liable for all damages and the penalty stipulated in the charter party.

That the steamship was compelled to remain in port some days beyond the lay days stipulated before she could contract for another cargo.

That the respondents are indebted to the libelant in the full sum of damages, and the freight of seven shillings, six pence per quarter on 11,500 quarters of wheat of 480 pounds, amounting in the total to £4012 and 10 shillings (of currency when in New Orleans, $20 700), and demurrage £50 per diem; and prayed for process *in personem* against Camors & Co.

The answer of the respondents (record, page 6) admits the ownership of the "Highbury," and that the vessel was staunch and well equipped; but avers that the tonnage was 1203 instead of 1100 tons. Admits the agency of A. B. French & Co.; that the charter party set out in the libel was executed as set forth; that the "Highberry" was in the port of New Orleans, ready to receive cargo, on the 11th of September, 1879. Admits that a demand was made on them for cargo, and refusal to furnish the cargo; that they did not lade the vessel, and that there was protest, as stated in the libel; and justify their conduct by averring that at the time of the execution of the charter party the vessel was at sea; that the charter party described the vessel as at about 1100 tons; that on the arrival of the vessel in port they discovered that the vessel was of a larger tonnage; that on discovering that the vessel was of more than 1100 tons they notified the libelant that they would not lade the vessel. Avers that the libelant suffered no damage.

Two amendments of the answer were subsequently filed (record, pages 9-11), in no manner changing the issues. No fraud is charged against the libelant.

The cause was heard in the district court in April, 1880, and the libel dismissed. (Record, page 12.) The libelant appealed to the circuit court, and the decree was reversed, with a decree

for $5,693.15 against the respondents. (Record, page 28.)

The circuit court found as facts—

That the charter party, as set out in the libel, was entered into on the 7th day of August, 1879.

That the libelant complied with the contract; that the vessel was, on the 11th day of September, 1879, in the port of New Orleans, ready to receive cargo; cargo was tendered to the respondents; a cargo of wheat in bulk demanded and refused.

That the actual tonnage of the "Highbury" was 1203 tons; was a new vessel, and at the date of the contract neither party knew her exact registered tonnage or carrying capacity.

That all negotiation between parties was with reference to the carrying capacity of the vessel, which, under the custom of shippers of grain, might run not exceeding ten per cent. above or below the cargo stipulated for.

That the actual capacity of the "Highbury" for grain was about 11,500 quarters of wheat.

That the libelant suffered loss from the default of defendants amounting to $5693.15, with five per cent interest from October 10th, 1879. (Record, page 26 *et seq.*)

In an additional finding (record, page 29) the court found that the ship was tendered on September 11th, 1879; that the defendants refused to accept the vessel by a communication of date September 12th, 1879; that during the stipulated lay days various negotiations were pending between the parties; that on September 30th, 1879, the master caused public protest to be made before a notary, with witnesses, of the neglect and refusal of defendants to accept the ship; that on October 19th, 1879, the master obtained a cargo of cotton and oil cake, the gross weight of which exceeded in amount the wheat cargo contracted for in the charter party by the sum of $532.16 [in this estimate the difference in expense of loading and unloading a cotton cargo—comprising stevedore expenses, etc.—is not taken into account]; that the estimated amount of freight, which was the penalty

stipulated in the charter party, amounted to sum of $20,872.50.

The libelant, in making up a record for this appeal, has carried into the transcript an alleged report of a commissioner on the matter of damages. This is no part of the record, and cannot be considered. At best it is only a part of the report, as the testimony and depositions upon which the commissioner based his report are not brought up, so as to permit a new trial in this court. All facts in dispute at any time are considered in the findings by the court.

The answer of the defendants is no defence to the libel.

If it be taken as a fact that the "Highbury" was named in the charter as 1100 net tonnage, and turned out to register 1203, it was description, not warranty. Neither knew the exact tonnage of the vessel. No fraud is charged. It is not claimed that the vessel could not carry the stipulated 11,500 quarters of wheat stipulated in the charter.

A representation that a vessel is one hundred and eighty tons burden, when in fact she is only eighty tons, is mere description. Baker vs. Windle, 6 Ellis & B. 675.

In Ashburner vs. Balchen, 7 N. Y (3 Seld.) 262, it was held that although a charter party described the vessel's tonnage to be one hundred and ninety tons or thereabouts, and she turned out to be only one hundred and forty-two tons, it was error in description and not warranty, and, in the absence of fraud, did not avoid the contract.

The same doctrine is held in Thomas vs. Clark, 2 Starkie's Reports 450.

The controversy is however terminated, as far as this case is concerned, by the finding of the court, that, with her registered tonnage of 1203 tons, the "Highbury" had no more than sufficient carrying capacity to take on board the stipulated 11,500 quarters of wheat.

Unless the libelant is entitled to the liquidated damages contracted for in the charter party, the question of the actual

loss to the libelant from the breach of the charter party is also settled by the finding of the court, as carried into the decree, and cannot be opened as a question of *the actual damage caused* by the breach and non-performance.

The libelant has appealed from the decree, believing that the charter party, by its terms, liquidated damages in case of violation; that the penal clause of the charter party measures the sum which libelant was entitled to recover in case of absolute non-performance

ASSIGNMENT OF ERROR.

The court, under the pleadings and findings of facts, erred in not decreeing the full sum of twenty thousand eight hundred and seventy-two dollars and fifty cents as damages, instead of the five thousand six hundred and ninety-three dollars and fifteen cents as decreed.

A contract to lade a ship is simply a contract differing in no manner, as a contract, from a contract to build a ship or construct a house, and is governed by the law of the place where the contract is made or is to be executed, as the case may be. This contract of charter party was made in Louisiana The ship was to be laden in Louisiana, and was brought within the jurisdiction of that State to be laden. The law of Louisiana is a part of the contract. This is the rule both at common law and civil law.

In *Chase vs. Insurance Company*, 9 *Allen (Mass.)* 311, it was held that a charter party executed in Scotland is governed by the law of Scotland.

Horiland vs. Holstead, 34 *N. Y.* 643.
Mother vs. Bush, 16 *Johnson* 233.
Thompson vs. Ketchum, 8 *Johnson* 189.
Jewell vs. Wright, 30 *N. Y.* 259.
Cox vs. United States, 6 *Pet.* 172.
Lanusse vs. Barker, 3 *Wheat.* 102.
Davis vs. Gass, 2 *Seld. N. Y.* 124.
Curtis vs. Levitt, 15 *N. Y.* 227.

6 *Paige* 230; 2 *Kent's Comm* 457.

Story's Conflict of Laws, sections 317, 320, 332, 349, 261, 263, 282, 298.

As all of the ports named in the charter party as possible ports of delivery of cargo are ports of nations governed by civil law, if the contract had been executed neither vessel or cargo would have passed from under the dominion of civil law during the performance of the charter party, if it had been performed.

The law of Louisiana and the civil law is by legislative enactment in exact accord with the common law in this particular. *Articles 9 and 10 of the Louisiana Civil Code:*

"*Art. 9. The law is obligatory upon all inhabitants of the State* " *indiscriminately. The foreigner whilst residing in the State and* " *his property within its limits are subject to the laws of the State.*

" *Art. 10 The form and effect of public and private written* " *instruments are governed by laws and usages of the place where* " *they are passed or executed.*"

There can be no doubt that the contract in question is governed by the laws of Louisiana. The Louisiana Code is clear on the subject of interpretation of contracts

"Art. 1945. Legal agreements, having the effect of law upon " the parties, none but the parties can abrogate or modify them. " Upon this principle are established the following rules: 1st. " That no general or special legislative act can be so construed " as to avoid or modify a legal contract previously made. 2d. " That courts are bound to give legal effect to all such contracts, " according to the true intent of all parties. 3d. That the in- " tent is to be determined by the words of the contract when " these are clear and explicit, and lead to no absurd conse- " quences." * * *

The character and effect of the penal clause in contracts is the subject of considerable legislation. Article 2117, Civil Code, defines a penal clause:

"Art. 2117. A penal clause is a secondary obligation entered

" into for the purpose of enforcing the performance of a primary " obligation."

Article 2118 enacts that a penal obligation supposes two distinct contracts: one to do or give a particular thing; the other to do or give something in the event that the principal or primary agreement is not carried into effect or observed.

Article 2119 enacts that in all contracts with penal clauses there must be a principal agreement; that the penalty is due only on condition that the first or primary part of the contract is not performed.

Article 2120 enacts that the penalty is not incurred if the performance of the primary obligation is prevented by inevitable accident or irresistible force.

Article 2121 enacts that under certain circumstances the penal clause becomes the principal obligation, and may be recovered, although there may have been prevention from inevitable accident.

Article 2124 enacts that the creditor may elect whether he will sue for the penalty or for the performance of the principal obligation.

Article 2125 enacts that the penal clause is the compensation for the damages The creditor cannot demand both penalty and the principal obligation. That is, the penalty is the liquidated damages of the common law.

Article 2127. Courts are given power to modify the penalty only when the principal obligation has been "*partly executed.*" *La. C. C., from article* 2117 *to article* 2129, *inclusive.*

The Louisiana Civil Code has modified the Roman and French law in some particulars. The subject is treated at length in *Pothier on Obligations, chapter V.* The legislature of Louisiana solved the dispute whether courts could, under any circumstances, mitigate the penalty stipulated, by giving the courts authority to abate the full penalty where there had been *partial performance* of the primary or principal obligation.

The rule at common law is in principle the same. All modifications of the doctrine as it is in the civil law has resulted from the tendency of the common law to convert obligors in penal stipulations into a condition of infancy, and absolve them if possible, with little regard for consistency.

The rule at common law is undoubtedly that, in all cases where it is clear from the contract that the parties intended to liquidate damages in a penal clause, the courts will hold parties to their agreement and liquidation.

The common law doctrine of liquidated damages is elaborately discussed and considered in *Bagley vs. Peddie*, 16 N. Y. (Court of Appeals) 469, 472, and an effort is made to reduce to approximate consistency the extremely artificial distinction made by the courts in England between "penalty" and "liquidated damages.'

The French commentators are celebrated for wire drawing in matters of jurisprudence, but they must yield to the English courts in measure of extreme attenuation in the matter of liquidated damages and penalty, and the rules of construction by which it is to be determined whether the stipulation is "penalty" or liquidated damages.

The court in this case decided the following to be the common law:

"*If the language of the parties evinces a clear and undoubted in-*
"*tention to pay the sum mentioned as liquidated damages, in case of*
"*default of performance of some act agreed to be done, then the*
"*court will enforce the contract, if legal in other respects.*"

In the case at bar we are free from all of this subtlety, for the "Highberry" charter party was made in Louisiana, governed by the laws of Louisiana, and there was no performance by the defendants. The only condition that could vest the courts with power to modify the penalty, under the terms of article 2127, C. C.—to-wit: *partial performance*—is negatived by the answer and findings of fact. The law of Louisiana makes the penal clause *liquidated damages* by express statute.

In Louisiana there is no hair-splitting learning on the science of confusing agreed liquidated damages into meaningless "penalty." Penalty is liquidated damages under all circumstances where there has been absolute default on the principal obligation.

Barrow vs. Bloom, 18 *La. An.* 276.

Hunt vs. Zuntz, 28 *An.* 500, is a case where both the principal obligation and the penal clause were enforced.

We respectfully submit that the judgment or decree of the court below should have been for the full stipulated damages, the agreed freight money on 11,500 quarters of wheat, at seven shillings and sixpence per quarter, found by the court to have a value in federal currency of twenty thousand, eight hundred and seventy-two dollars and fifty cents ($20,872.50); all of which is respectfully submitted.

J. R. BECKWITH.

Of Counsel for Libellant and Appellant in Cross Appeal.

115-353

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SUPREME COURT OF UNITED STATES.

OCTOBER TERM, 1884.

THE "HIGHBURY" CASE.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & CO., *Appellants*,
versus
EDMUND H. WATTS.
No 292.

EDMUND H. WATTS, *Appellant*,
versus
J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & CO.
No. 450

Appeals from the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

BRIEF FOR J. B. CAMORS & CO., DEFENDANTS.

J. WARD GURLEY, JR.,
Att'y for J. B. Camors & Co., Charterers.

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SUPREME COURT ❦ UNITED STATES.

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STATEMENT OF THE CASE.

This case is one of alleged violation of a Charter Party by the Charterers, without good and sufficient reason :

The Charter Party is quoted in the record at page 2, and it is unnecessary to repeat it here. The substance of the defense set up by charterers is : that the vessel tendered to them was of 1203 tons, net registered measurement, instead of 1100 tons, as stipulated in the Charter Party, and of a much greater carrying

capacity than a vessel of 1100 tons measurement, and that the vessel tendered was therefore wholly unsuited for the purpose and object of the Charter Party, and she was therefore rejected.

That the vessel was not in this port, nor registered here when the Charter Party was executed, and Charterers were compelled to rely upon the stipulations of the owners, relative to the tonnage of said vessel. That contracts for the sale of American wheat are usually made by the cargo, to be transported from the United States by vessels chartered for the purpose by the vendors of the wheat; that to comply with said contracts of sale, and to prevent the rejection of the cargo by the purchaser, it is requisite that the cargo put on board the vessel for delivery to the purchaser, should conform with the quantity sold, and that this requisite, at and before the execution of the Charter Party was recognized and enforced, in usage and known to all interested, and is to be deemed to have entered into said Charter Party as an essential condition thereof. That previous to the execution of said Charter Party, Gordon & Gomila, to whom Charterers afterwards assigned said Charter Party, made a contract for the sale and delivery by them of a cargo of American wheat, at a port on the Continent of Europe, between Antwerp and Bordeaux, said cargo to be of not less than 8,000 quarters, nor more than 10,000 quarters, and that to carry said cargo and fill the requirements of said contract, Charterers sold and assigned to said Gordon & Gomila the said Charter Party, relying upon the stipulation of the owners in said Charter Party, that the vessel was only of 1100 tons net registered measurement, a full and complete cargo for which would not exceed 9700 quarters of wheat.

That the vessel tendered being more than 100 tons in excess of the measurement stipulated for in said Charter Party, and her carrying capacity being so much larger than that of a 1100 ton vessel, it was impracticable to use said vessel to fulfill said contract to sell and deliver said wheat, except by pay-

ing dead freight on the said excess of the vessel's actual carrying capacity, as the Charter Party required and owners demanded a full and complete cargo to be furnished, record page 28, or, except by loading on board a quantity of wheat beyond that contracted to be sold and delivered, which would have exposed the entire cargo to rejection by the purchaser. And that the said Gordon & Gomila were consequently obliged to charter another vessel, the "Ben Vorleck," to carry said cargo. and for which other vessel they had to pay a higher rate of freight than stipulated in said Charter Party. Record, pages 9 and 11.

Further, the defense contends that the tonnage of a vessel being susceptible of exact statement, is the standard of measure of the carrying capacity of vessels in Charter Parties, and their fulfilment in contracts based upon Charter Parties, and that the stipulation in reference thereto is material; and that because of the great variance between the stipulations of the Charter Party in respect to the tonnage, and the actual tonnage and capacity of the vessel tendered, the Charter Party became void, and no cause of action ever accrued to the owners.

Further, the defense sets up that as a matter of fact the said vessel after she was rejected obtained another cargo from this port upon which it received freight in excess of that stipulated to be paid on the cargo named in the Charter Party, and that there was, therefore, no loss to owners.

The District Court, Billings, J., held that the tonnage statement was a substantive part of the contract, and that Charterers were justified in rejecting the vessel tendered, and therefore dismissed the libel. Record, p. 12. The Circuit Court reversed that judgment and awarded $5693 15 damages: hence this appeal.

ASSIGNMENT OF ERRORS.

The errors of the Circuit Court complained of, are:

1. The Court erred in not recognizing and holding the

tonnage statement to be a substantive part of the contract of Charter Party—a condition precedent and a warranty ; and that the great variance therefrom and breach thereof justified Charterers in repudiating the contract in toto.

2. The Court erred in finding and holding that the vessel or its owner suffered any loss or damage for which owners are entitled to recover of Charterers.

ARGUMENT.

I.

It seems almost useless to argue that the tonnage of a vessel is an essential part of her description and designation. Vessels are distinguished one from another not by the name merely, but by the nationality, the master, and the registered tonnage measurement. The name and the tonnage are the two most distinctive, most certain, most necessary means of description and identification.

Numbers of vessels of the same nationality may have the same name, and many of the same general character of vessels may have the same tonnage capacity, but it is not at all probable that there should be vessels of the same kind or character having the same name and the same registered tonnage measurement; therefore vessels are most generally if not universally designated by their names and registered tonnage measurement.

A vessel's character, as for example, whether it is a steamboat, sailing vessel, ship or schooner, and her nationality, are but general designations, and the Master is likely to be frequently changed. The name and tonnage measurement are therefore the most definite and certain designation.

The tonnage is fixed and registered by the official measure and the record given to the vessel upon its completion, and this tonnage measurement is, as it were, part of the vessel's name, or designation. It enters into the consideration of all its transactions. It is the basis for almost all of a vessel's business. It

is indispensable. There can be no uncertainty about the "registered measurement." It is official. The vessel has the record of it. It is as well known to the owners as the vessel's name. The carrying capacity, so far as quantity is concerned, is not officially ascertained and recorded, and in the very nature of things, can not be so definitely and accurately stated. It depends upon the character of the cargo, the particular voyage and distance between coaling stations, etc. From the registered measurement of tonnage the carrying capacity in quantity can be calculated exactly for any particular voyage and cargo.

In this case the Charter Party describes the vessel as, "S. S. 'Highbury,' of the burthen of 1100 tons, or thereabouts, *registered measurement*," and Charterers "engage to provide and furnish to the said vessel *a full and complete* cargo, say, about 11,500 quarters of wheat in bulk," etc., Record, p. 2, (Italics by Counsel). The word "about" and one or two other words are omitted from the copy of the Charter Party printed at page 27, of the record, under the findings by the Circuit Court.

"A ship of 1100 tons cannot carry over 9500 to 10,000 quarters of wheat." Opinion of Circuit Court, Record, page 14.

This fact was well known to all parties who had any interest whatsoever in shipments of wheat in bulk.

The Charter Party *asserts* the "registered measurement" to be "1100 tons, or thereabouts," and *requires* "a full and complete cargo," which it *estimates* ("say") "about 11,500 quarters of wheat." Both cannot be correct. Upon which should parties depend? There must be a selection, the variance is too great.

It can hardly be contended that both the tonnage and the quantity are mentioned in the Charter Party as mere representations, and that neither is a substantive part of the contract. Either the one or the other must have entered into the considerations of the parties and formed the basis of their calculations. Nothing could be more material than that the parties should

know either the tonnage or the carrying capacity in quantity; and the very language of the instrument, as well as the reasons heretofore advanced make it certain that the attention of the parties was directed to, and they depended upon the tonnage statement, and that the one intended, and the other regarded that statement a warranty. It was not known at the time, by either the Charterers or the Agents of owners, who drew up the Charter Party that the "Highbury" could carry 11,500 quarters of wheat. See 5th Findings of Fact by Circuit Court, Record, page 28.

The obligation of the Charter Party and the object and purpose of the parties clearly was *that a vessel of 1100 tons should be filled with wheal in bulk*, not that Charterers should furnish 11,500 quarters of wheat, and that a vessel capable of carrying that quantity should be furnished.

"A question, however, may arise, whether a descriptive statement in a written instrument is a mere representation, or whether it is a substantive part of the contract. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of this contract, and not a mere representation, the often discussed question may, of course, be raised whether this part of the contract is a condition precedent or only an independent agreement, a breach of which will not justify a repudiation of the contract, but only be a cause of action for compensation in damages.

"In the construction of charter parties this question has been often raised with reference to stipulations that some future thing should be done or shall happen, and has given rise to many nice distinctions.

"Thus a statement that a vessel is to sail or be ready to receive a cargo, on, or before a given day, has been held to be a condition. See Glaholm vs. Hayes, 2 Man., and G. 257; Oliver vs. Fielden, 4 Exch. 135; Crookwit vs. Fletcher, 1 H. & N. 893; 26 L. J. (Ex.); Seeger vs. Duthie, 29 L. J. (C. P.) 253; while a

stipulation that she shall sail with all convenient speed, or within a reasonable time, has been held to be only an agreement. See Panobochia vs. Hichie, 26 L. J. (Ex.) 26; Dimech vs. Corlett, 12 Moore, P. C. 199. See also Clipsham vs. Vertue, 52 B. 265.

"But with respect to statements, in a contract, descriptive of the subject matter of it, or some of it, or some material incident thereof, the true doctrine established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract it is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and be so relieved from performing his part of it, provided it has not been partially executed in his favor."

Maclachlan's Treatise on the Law of Merchant Shipping, page 343.

"It is plain that the Court may be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which and the purposes for which the Charter Party was entered into. For instance, if it were made in the time of war, the national character of the vessel is of such importance that a statement of it in the Charter Party might be properly regarded as a part of the ship-owner's contract, and so amount to a warranty. Whereas the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So, if it were shown that a Charter Party was made for a purpose, such that unless the vessel began her voyage from the port of loading with a cargo on board by a certain time, it was manifest that the object of the Charter Party would in all probability be frustrated, the Court might properly be led by these circumstances to conclude that a statement as to the locality of the ship,

coupled with the stipulation that she should sail with all convenient speed, was a warranty of her then locality."

Id. 344.

And on page 345, Machlachlan, continuing with the quotation of the above judgment, quotes: "And" (the Court) "further suggested that in deciding whether the breach on the ship owner's part was of such an essential stipulation as that described, the Court might advert to the fact whether such breach had frustrated that material object which the charterer had in view."

And again, on page 345, he continues:

"The single word descriptive of her national character may, during hostilities, or under a prohibitory policy, amount to a warranty."

And on page 347, same work:

"Thus, in a memorandum of a Charter Party, it was stipulated that the ship now at sea, having sailed three weeks ago, or thereabouts, should proceed for cargo to Marseilles, after having discharged at Genoa; but, in fact, she had sailed at a much later period, and this was held a good defense for the freighter to an action for non-performance. So, the words after the name of the ship, 'expected to be in Alexandria about the 15th of December,' in a Charter Party stipulating that the vessel shall with all convenient speed sail and proceed to Alexandria, were held a warranty that the ship was in such a position that she might reasonably be expected to arrive there by that day. Where the ship was described as 'now in the port of Amsterdam,' these words were held to be a warranty in a Charter Party stipulating that she shall with all possible dispatch proceed to Newport, etc., and as she was not then in the port of Amsterdam, as described, though only prevented by contrary winds, the charterer was not bound to load her."

Id. 347.

"Cargo was held in a recent case between merchants to mean a ship load, and the English buyer ordered a 'small cargo' of about sixty fathoms of lathwood, and his foreign correspondent, not able to find so small a vessel, chartered one that was 83 fathoms, and on its arrival at the buyer's port, tendered him sixty fathoms, part of the larger cargo, he might refuse to accept it. Kreuger vs. Blanck, L. R. 5 Ex. 179."

Id. 349.

"In Glaholm vs. Hays, the Charter Party stipulated in the common form, that the ship being tight shall proceed to....., and there load....., and thence proceed to....., and deliver; and then was interposed the clause, 'the vessel to sail from England on or before the 4th day of February.' Tindall, C. J., after pointing to the position and different nature of this clause among the other agreements, and to the purposes of the market which were to be served by timely performance, said: The present case appears to us to be distinguishable from those cited on the part of the plaintiff in both the particulars to which we adverted, namely, that in this case the form of the stipulation is more nearly in the language of condition than in that of agreement, whilst in the cases cited, the stipulation is in the language of covenant only; and again, that in this case the performance of the stipulation goes more to the very root and whole consideration of the contract. And indeed, in most or all of those cases, the objection has not been taken until after the voyage had been performed, nor, in many cases, until after the goods had been accepted, so that it is manifest the breach of the agreement of which the defendant complained, and which he sought to set up as non-performance of a condition precedent, could not go to the whole of the consideration of this contract. Such was the case of Constable vs. Globerie, where the ship owner covenanted that his ship should sail with the first fair wind; the case of Bornmann vs. Tooke, 1st of Camp, 377, where the covenant was that the ship should sail with the first favorable wind; and the defence

in which was set up against a demand for the freight after the ship had performed her voyage, and the merchant had accepted the cargo; so, likewise in Davidson vs. Gwynne, 12 East, 381, the covenant to sail with the first convoy, was held not to be a condition precedent, the voyage being in fact performed; and so all the rest. In the case before the Court, therefore, as the ship owner had not dispatched his vessel on or before the 4th of February, it was held that he had no right of action against the merchant for not providing a cargo." Id. 351.

"In like manner, where the contract was to provide a cargo at Jamaica, in time for the July convoy, provided the ship arrived outwards, and was ready to receive it by the 25th of June; and again, where it was agreed that the vessel should sail from Madeira to Wynnyaw, in South Carolina, and that the freighter should be under no obligation to provide a cargo if the vessel were not at Wynnyaw by the 4th of March; the stipulation as to time in each case was held to be a condition precedent, and breach thereof, unless covered by some exception, actually stipulated for in the charter-party, was a good answer to an action for non-performance by the merchant." Id. 352.

"A, in Boston, was in correspondence with B, in New Orleans, in reference to the chartering of a ship to B to carry freights from New Orleans to Europe, and represented that the ship would sail from Boston to New Orleans on a day certain. Held, that the representation amounted to a warranty, that the ship should sail on that day. The ship did not sail for two days after the time fixed: therefore B was not bound." 1 Woods, 286, Dishon vs. Fosdick & Co.

In 3d Ben. 499, Baker vs. Ward, "where a Charter Party of a vessel stated her to be of the burthen of 427 tons, 'or thereabouts,' but contained no other statement as to her carrying capacity:"

"Held, that any other agreement as to her carrying capacity must be held to have been waived by the charterer, and

that evidence of false representations by the owners as to her carrying capacity, and of the charterers being induced thereby to make the charter, was inadmissible," and the Court, in rendering the judgment, says: "The answer sets up that at and before the making of the Charter Party, the libellant, in order to induce the respondents to enter into the charter, falsely and fraudulently represented to them that the vessel would carry and had already carried 3000 round barrels of oil; that the respondents, relying upon such representation and believing the same to be true, chartered the vessel and loaded her for the voyage mentioned in the charter, with all the cargo she could carry; that she would not carry 3000 round barrels of oil, but only 2600; that such representations were false, and known by the libellant to be so; that the respondents sustained great damage therefrom, and that by reason thereof, the charter was void."

"The Charter Party, of which a copy is annexed to the libel and forms a part of it, contains no statement of the carrying capacity of the vessel. It merely states that the vessel is 'of the burden of 427 tons, or thereabouts.'"

"The respondents, at the trial, offered to show, by evidence, the making by the libellant and the falsity of the representations before named; that such representations induced the respondents to enter into the Charter Party and to agree to pay a larger sum for charter money than they would otherwise have agreed to pay; that the libellant knew such representations to be false; and that on the voyage in question, the vessel was loaded to her full capacity and carried only the bulk of 2600 round barrels of oil." "The Court excluded such evidence, on an objection to it by the libellant."

"The evidence was inadmissible for the reason that the Charter Party being in writing, parol evidence was not admissible to vary its terms, and that any stipulation or agreement, as to the carrying capacity of the vessel, which was not found in

the written contract, must be considered as having been waived by the respondents. Parsons on Marine Law, book 1, chap. 8, page 230. The Ele Whitney, 1 Blatchford, C. C. R. 360; Pitkin vs. Brainerd, 5 Conn. 451; Bernard vs. Sampson, 2 Keene, 561."

Again, the Charter Party expresses the object of the chartering and the particular trade and cargo contemplated, viz: "For a voyage from New Orleans to Havre, St. Nazaire, Antwerp, Bordeaux, or Bremen, orders on signing bills of lading * * * wheat in bulk." The usages of that trade are well known and undisputed. When a vessel is so chartered it is for the purpose of filling a contract for the sale of American wheat and its delivery on the other side. The invariable requirements of the custom and usages governing such transactions are that the wheat delivered must be a full and complete cargo for the vessel transporting the same, and that the cargo must not vary more than 10 per cent. either over or under the quantity named in the contract of sale. Any deviation from these rules warrants the purchaser of the wheat in rejecting the tender and claiming damages. The margin of 10 per cent. either way being allowed to facilitate the seller in procuring a vessel to fit the quantity.

Reviewing the authorities on the effect of usages in the interpretation of Carter Parties, Mr. Machlachlan, in his Treatise on the Law of Merchant Shipping, at page 359, thus quotes from the following cases, viz:

"The general rule which our courts of law have adopted in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, or of the particular trade to which the contract relates."

"Davidson vs. Gwynne, 12 East. 381; see Tindall vs. Taylor, 41, and B. 219; The Patria, L. R., 3 A. E. 436; Sully vs.

Duranty, 33 L. I. (Ex.) 319; Bradford vs. Williams, L. R. 7 Ex. 259."

And on page 360:

"In fact, evidence of usage has been admitted as to contracts relating to transactions of commerce, trade, farming, or other business, for the purpose of defining what would otherwise be indefinite, or to ascertain what was equivocal, or to annex particulars and incidents, which, although not mentioned in the contracts, were connected with them or with the relations growing out of them, and the evidence in such cases, is admitted with the view of giving effect as far as can be done to the presumed intention of the parties.

2 Philips' Evid. 415, referred to by Lord Campbell, C. J.; Humfrey vs. Dale."

And page 361:

"If the usages of a particular part are well known, at least in the trade to which the Charter Party relates, it will be held, in the absence of exclusive words in it, to have been framed on the basis of such usages, although to one of the contracting parties these usages at the time were unknown."

"Hudson vs. Ede, L. R.; 2 Q. B. 566, in error; 3 id. 412."

Owners failed to tender a vessel of 1100 tons "registered measurement," and instead tendered a vessel of 1203 tons "registered measurement" with a much greater carrying capacity than a vessel of 1100 tons, and demanded therefor a full cargo of wheat in bulk; Record, pages 14 and 28. Charterers and their assigns, Gordon & Gomila, therefore rejected the tender and Gordon & Gomila were compelled, because of the failure of the owners to furnish a vessel of 1100 tons, to charter another vessel, the "Ber Vorleck," at a higher rate, to fulfill their contract to deliver a cargo of not less than 8000 nor more than 10,000 quarters of wheat, and for which purpose they had taken from Camors & Co., the said Charter Party. Record, pp. 9, 10, and 11.

II.

Even should the Court hold that the tonnage statement was not a substantive part of the contract of the Charter Party, and that Charterers were not justified in refusing to load the vessel tendered, it is urged that there was no damage suffered for which Charterers are liable.

The vessel was tendered on the 11th of September, and rejected in writing on the 12th September. See 2d and 3d Findings by the Circuit Court, Record, page 28. It was the plain duty of the Master and owners to have at once sought another cargo, and thus prevent any damage that might follow the rejection of the vessel instead of lying idle until the lay days had expired as was done.

In Warren vs. Stoddart, 105 U. S. 229, this Court has declared that: "The rule is, that where a party is entitled to the benefit of a contract, and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertions, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. Wicker vs. Hoppock, 6 Wall. 94; Miller vs. Mariners' Church, 7 Me. 51; Russell vs. Butterfield, 21 Wend. (N. Y.) 300; United States vs. Burnham, 1 Mason, 57; Taylor vs. Read, 4 Paige, (N. Y.) 561."

On the 19th October (when the first effort was made), the Master obtained in this port a full cargo of cotton and oil cake for the vessel, the freight of which *exceeded* in value that of the wheat cargo contracted to be furnished by Charterers in the sum of $532 16. See second finding of Circuit Court, record, page 29.

Owners claim the estimated amount of freight, $20,700, and two days' demurrage, $480, total $21,180. The Circuit Court awarded $5693 15, being for certain expenses and twenty-one days' demurrage.

The error of both the claim and the allowance is plain. The estimated amount of freight could not, in any event, be allowed. The Charter Party is an Admiralty contract, and must be construed and enforced according to the well settled rules and principles of Admiralty and Equity proceeding as they are recognized and prevail in the commercial world; and under which nothing but the actual damages can be allowed. 1 Parson's Adm. Law, pp. 247 and 248; Story on Contracts, Sec. 1022 d; Conkling's Adm. *verbo* Affreightment; Abbot on Shipping, p. 285; 13 Howard, 268. 1 Peters' Adm. 104, Thompson vs. Catharina; The Barque Chruson, 2 Story, 456; Harrison vs. Stewart, Taney, 485; The Tribune, 3 Sum. 144.

And, as has already been shown, the vessel received $532 16 more freight for the cargo it obtained than it would have received had it been loaded under the charter, and that there was no loss or damage which the owners and their agents could not easily have prevented with the most "reasonable exertions;" and it was their "duty" to have prevented said alleged loss, and they therefore cannot recover from the Charterers.

Respectfully submitted.

J. WARD GURLEY, JR.,

Att'y for J. B. Camors & Co., Charterers.

NEW ORLEANS, La.,
April 4, 1885.

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OCTOBER TERM, 1885.

THE "HIGHBURY" CASE.

J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & CO., APPELLANTS,
v.
EDMUND H. WATTS. } No. 33.

EDMUND H. WATTS, APPELLANT,
v.
J. B. CAMORS AND J. H. JACKSON, COMPOSING THE FIRM OF J. B. CAMORS & CO. } No. 176.

Appeals from the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

Supplemental brief for J. B. Camors & Co., defts, appellants, and appellees in cross-appeal by Watts.

J. WARD GURLEY, JR,
Proctor for J. B. Camors & Co.

WASHINGTON, D. C., *Oct.* 21*st*, 1885.

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1885.

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WASHINGTON, D. C., *Oct.* 21*st*, 1885.

As supplemental to the brief hereinbefore filed on behalf of J. B. Camors & Co., charterers and appellants, counsel asks leave to submit the following references, viz:

I.

ON THE CONSTRUCTION OF THE PENAL CLAUSE IN THE CHARTER PARTY.

"By a bond, the amount of penalty is usually greater than the damage, and courts of equity reduce the sum to actual measure of injury, and now both in England and America this is constantly done by courts of law."

"And it may be regarded as the tendency and preference of the law, to consider a sum payable for a breach of a contract, as a penalty over which it has control, rather than as liquidated damages."

"For it is obvious, that where parties agree upon the damages to be paid for a breach of contract, whatever name they gave to it, they do substantially the same thing which is done by a bond with penalty. And there is no more reason why the courts should regard the agreement, if it opposes reason and justice, in the one case than in the other."

3 Parsons on Contracts, (7th ed.,) pp. 166 and 167, (bottom paging.)

"The general reason of this rule is, that where the injury resulting from a breach of contract is ascertainable at once by computation, or is capable of immediate and exact measurement by other means, so that the parties could have certainly provided for exact compensation, if the sum they agree upon is more than this, it may be presumed that it was really intended as a penalty, or that there was oppression on the one side and weakness or inadvertence on the other; or if not these, that the principle was disregarded, which, alone, the law recognizes as the first measure of damages, that is, the principle of compensation."

"And the court will do, with the aid of a jury, what the

parties have not done; that is, they will apply the principle."

3 Parsons on Contracts, (7th ed.,) p. 169, (bottom paging.)

To the same effect are the cases in 17 Court of Claims Rep., 201, (1881;) 87 Ill., 107; 12 Bush., 249; 6 Sawyer, 319; 16 Louisiana Rep., 188; besides the number of other cases cited by Mr. Parsons.

So in the case of Taylor and others *v.* Steamer "Marcella." (1 Woods 302.) The owners of a steamer entered into a contract for the carriage of 70,000 staves, in which was this stipulation: "We agree to forfeit $1000 if we fail to carry out this contract." The contract was partly performed by the carriage of 57,000 staves, and the part performance accepted. *Held*, that the contract provided for a penalty to cover actual damages, and did not provide for liquidated damages, and as no actual damage was shown, none was allowed. In the opinion, Justice Woods says, (pages 303and 304:) "The precise point to be determined is whether the $1000 named in the contract is to be considered a penalty merely, or as liquidated damages.

"Suppose the Marcella had refused to perform any part of the contract, could Avendano Bros. have recovered the $1000 for the breach? In answering this question it is to be noted, first, that where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages, or a penalty to cover actual damages, the courts hold it to be the latter. (Bearden *v.* Smith, 11 S. C. Law Rep., 554.)

"One of the tests by which this question is to be solved is the language of the contract. In the contract under consideration the word *damages* is not used. The language is: 'We, the owners of the Marcella, agree to forfeit $1000 if we fail to carry out this contract.' While no particular phraseology is held to govern absolutely, and although the term 'liquidated damages' will not be con-

clusive, the phrase 'penalty' is generally so, unless controlled by other very strong considerations. (Higginson *v.* Weld, 14 Gray, 165; Richards *v.* Edick, 17 Barb., 260; Leggett *v.* Ins. Co., 50 *Id.*, 616; Powell *v.* Burroughs, 54 Penn. St., 329.)

"The word penalty is not used in this contract, but the word *forfeit* is, which may fairly be regarded as an equivalent."

"The verb 'to forfeit' is defined, 'to lose by some breach of condition; to lose by some offence.'"

"The noun 'forfeit' is defined to be 'a forfeit, a fine, a mulct.'"

"The noun 'penalty' is defined, 'forfeiture, or a sum to be forfeited for non-compliance with an agreement; a fine.'" (See Worcester's Dictionary.)

"These definitions show that the words *forfeit* and *penalty* are substantially synonymous, so that when the owners of the Marcella agreed that in a certain contingency they would forfeit $1000, their meaning was that the penalty for non-performance should be that sum. So that the contract under consideration provided for a penalty to cover actual damages, and did not stipulate for liquidated damages.

"The damages sustained by a breach of this contract were such as could, without difficulty, be ascertained. This is another reason for construing the contract to provide for a penalty to cover actual damages only. (Kimble *v.* Farren, 6 Bing., 141; Lampman *v.* Cochran, 16 N. Y., 275; Higginson *v.* Weld, 14 Gray, 165; Berry *v.* Wisdom, 3 Ohio State, 241.)

"In Taylor *v.* Sandford, (7 Wheat., 13,) Marshall, C. J., said: 'In general, a sum of money to be paid in gross for the non-performance of an agreement is considered a penalty. It will not, of course, be considered as liquidated damages.'"

In the case at bar the language of the contract is "in the penal sum of estimated amount of freight."

It would seem from the expressions which occur in the

following cases that the Louisiana courts have not entertained different views.

In the Case of Brant et. al. *v.* La. State Bank, 8 Martin's (O. S.) Louisiana Repts., p. 311, (in 1820,) the court said: "In cases of penalties or forfeitures incurred by individuals, according to the stipulations of their contracts, courts of justice have generally interposed their equitable powers to relieve against the hardship and iniquity of an unreasonable penalty, by reducing the damages to an equality with the injury which the party claiming may have sustained." But the court held that it could not relieve against a forfeiture to which a person may have become liable "under an express statute, clear and explicit in its terms."

And in the case of Churchwardens *v.* Peytavin, 1 Martin's (N. S.) La. Repts., at page 402, (1823,) on this subject the court says: "It is true the defendant bound himself to pay $250 by way of damages, if he did not pay the rent of $250 on the day it became payable, and the law has provided that, 'when the contract specifies that he who fails to execute it, shall pay a certain sum, by way of damages,' the other party can recover neither a larger nor smaller sum, (Civil Code, 268, art. 52,) and the worldly fathers of the parishioners appear entitled, under this provision, to the pound of flesh. But the following article (53) makes an exception to the general rule. In obligations confined to the payment of a certain sum, the damages arising from the delay in the execution *are never* adjudged to exceed the interest fixed by law, except where particular rules of commerce and suretyship govern the case."

And in the case of English *v.* Latham, 3 Martin's (N. S.) La. Repts., at page 90, (in 1824,) the court refused to give the whole penalty, and as there was no "datum from

which any calculation could be made," the case was remanded.

Again, in the case of Welch & Co. *v.* Thorn et. al., 16 La. Repts., 188, (in the year 1840:) "In this State there being no distinction in the proceedings between the law and equity jurisdiction of our courts, the penalty of a judicial bond is disregarded, and judgment given for the damages which the party has really sustained."

As to the two Louisiana cases referred to by counsel for Watts on page 11 of his brief, viz: Barrow *v.* Bloom, 18 La. An., 276, and Hunt *v.* Zuntz, 28 La. An., 500. In the first only *nominal* damages were allowed. The second falls under another chapter of the Code—that which treats of *Arbitrations*, and not that which treats of *Obligations with Penal clauses.*

II.

ON THE QUESTION, BY WHAT LAWS THE CONTRACT IS GOVERNED?

It is purely a maritime contract, and its construction in the Admiralty courts of the United States is not affected by the laws of Louisiana.

The Admiralty jurisprudence of the United States is not one thing in one State and another in a different State. It is the same throughout the territory of the Government.

On this subject, in addition to the authorities cited on page 15 of the former brief filed herein, see Ins. Co. *v.* Dunham, (11 Wallace, 1.) At page 29 Mr. Justice Bradley, as the organ of this Court, says: "And whether maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the con-

tract was maritime. This may be regarded as the established doctrine of the Court."

And this case was followed in 4 Woods, 118.

The two decisions of this Court (6 Peters, 172 and 3 Wheat., 102) cited on page 7 of the brief for appellee, Watts, are not contrary to the views now urged on this branch of the case.

It is therefore respectfully submitted that the decree of the circuit court should be set aside and reversed, and that the claim of Watts should be dismissed at his costs.

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Proctor for J. B. Camors & Co.